Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

80-402

No. .....

In the Supreme Court of the United States

October Term, 1980

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. FRANK OGLETREE, JR.
HOMER L. DEAKINS, JR.
(Counsel of Record)
Attorneys for Petitioner

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11-CA-6038,
11-CA-6207, and
11-CA-6895

J. P. STEVENS & CO., INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO-CLC, SUCCESSOR TO TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

DECISION AND ORDER

On December 21, 1977, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions[1] and supporting briefs. The General Counsel and the Charging Party also filed briefs in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

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1. The J. P. Stevens Employees Educational Committee filed exceptions to the Administrative Law Judge's denial of its motion to intervene and a memorandum in support thereof. We find these exceptions to be without merit and affirm the denial of the Committee's motion to intervene.

cided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order as modified herein.[4]

The Administrative Law Judge found in four separate instances that Respondent engaged in a bargaining strategy violative of Section 8(a)(5) of the Act. This tactic consisted of developing comprehensive improvements in corporatewide benefit programs, keeping the Union in the dark regarding information necessary and relevant for purposes of collective bargaining, and timing the announce-

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2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

3. We also agree with the Administrative Law Judge's finding that the shift of investment responsibilities for the profit-sharing plan's assets from the trustee, Morgan Guarantee Company, to a committee of members of Respondent's board of directors violated Sec. 8(a)(5). A profit-sharing plan is a mandatory subject of bargaining. *N.L.R.B. v. Black-Clawson Company*, 210 F.2d 523 (6th Cir. 1954). *A fortiori*, so too is the issue of who controls the investment of a profit-sharing plan's assets. We further note the possible adverse impact of this change due to the loss of the investment expertise of the trustee.

4. After the period for filing exceptions and briefs to the Administrative Law Judge's Decision expired, Respondent filed a motion to reopen the record and to conduct additional hearings. Respondent asserted that the evidence sought to be adduced would show numerous actions taken since the close of the hearing herein to assure compliance with the Act. This evidence, even if establishing Respondent's assertions, however, would not in any way undercut our findings herein. Respondent's motion is therefore denied.

ment or implementation of these changes to preclude any meamingful negotiation concerning their possible implementation at the Roanoke Rapids facility. Respondent's bargaining strategy thus confronted the Union with a "Hobson's choice"—either accept or reject unilaterally predetermined modifications in benefit programs. The record in this case clearly demonstrates that this tactic was a most effective means of undermining the collective-bargaining process and denigrating the Union's status as collective-bargaining agent. Because these violations go to the very heart of the Act and our national policy, we deem it necessary, in agreement with the General Counsel, to impose and additional remedy directed specifically at this conduct. Accordingly, we will require Respondent to notify the Union promptly of any decision to announce or institute systemwide changes in employee benefits; to produce upon request all information relevant thereto for purposes of collective bargaining, prior to the announcement or implementation of such changes in benefits on a companywide basis; and to afford the Union an opportunity to negotiate regarding similar or identical contemplated changes at the Roanoke Rapids plant.[5]

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5. The Administrative Law Judge recommended that paragraphs 2(g), (h), (i), (j), and (k) of his Order be applied to Respondent's plants and facilities not comprehended by the contempt adjudication issued by the United States Court of Appeals for the Second Circuit in *N.L.R.B. v. J. P. Stevens & Co., Inc.*, 563 F.2d 8 (2d Cir. 1977). We disagree. The Order in the instant case is designed to remedy unfair labor practices separate and distinct from those considered by the Second Circuit. Therefore, to remedy fully the violations found herein, we have modified the Administrative Law Judge's recommended Order and direct that said Order be applied to all of Respondent's plants and facilities, including those plants and facilities covered by the Second Circuit's order. Accordingly, fn. 74 is deleted from the recommended Order. In addition, we have modified the Administrative Law Judge's recommended Order by also requiring that Respondent include in appropriate company publications, such as employee newsletters, a copy of the notice, together with Appendix B, the explanatory letter. *Florida Steel Corporation*, 231 NLRB No. 117 (1977), and *Florida Steel Corporation*, 233 NLRB No. 74 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and orders that the Respondent, J. P. Stevens & Co., Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified:

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Give prompt notice to the Union of Respondent's decision to announce or institute systemwide changes in employee benefits; produce upon request all information relevant thereto for purposes of collective bargaining, prior to announcement or implementation of such changes in benefits on a companywide basis; and afford the Union an opportunity effectively to negotiate regarding similar or identical contemplated changes in such employee benefits for the bargaining unit at the Roanoke Rapids plant."

2. Substitute the following for the newly lettered paragraph 2(f):

"(f) Reproduce and mail to the home of each of its employees at all of its plants a facsimile of the aforesaid signed notice, together with the letter appended hereto as "Appendix B." Said letter shall be reproduced on the Company's regular business stationery and signed by the highest official of the recipient's plant. Also include in appropriate company publications, such as employee newsletters, a copy of the notice, together with Appendix B. Respondent shall provide the Regional Director for Region 11 with proof of such mailing and publication."

3. Delete footnote 74.

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 12, 1978

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
Betty Southard Murphy, Member
John C. Truesdale, Member
National Labor Relations Board

(Seal)

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has again found that we violated the National Labor Relations Act. We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for purposes of collective bargaining or other mutual aid or protection

To refrain from any or all these things.

The Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, is the recognized collective-bargaining representative of our hourly employees at Roanoke Rapids, North Carolina.

WE WILL NOT refuse to bargain in good faith for a collective-bargaining agreement with the aforesaid Union regarding wages, hours, and working conditions of the employees in the bargaining unit; WE WILL NOT take action affecting wages, hours, and working conditions of such employees without negotiating with the Union; and WE WILL NOT refuse to furnish information to the Union to which it is entitled under the law. The foregoing applies as well to any labor organization which is now, or hereafter becomes, entitled to represent any of our employees.

WE WILL compensate, with interest, all Roanoke Rapids employees who were affected by our 1974 change in the policy relating to free time for employees working double shifts, and WE WILL compensate, with interest, all Roanoke Rapids employees who lost money because of our change in the method of computing holiday pay in 1974 and 1975.

WE WILL compensate the Union and the Board for their expenses in preparing for and conducting this case, and WE WILL compensate the Union for its expenses in participating in collective-bargaining negotiations with us between October 1974 and July 1976.

WE WILL send to all our employees copies of this notice, with an explanatory letter; WE WILL read this notice to all our employees; and WE WILL grant the Union, as ordered, access to our bulletin boards, access to our nonwork areas, speaking opportunities, and lists of the names and addresses of our employees at many of our plants.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

J. P. Stevens & Co., Inc.
(Employer)

Dated ..... By .....
(President)

Dated ..... By .....
(Chairman of the Board of Directors)

Dated ..... By .....
(Member of the Board of Director

Dated ..... By .....
(Member)

Dated ..... By .....
(Member)

Dated ..... By .....
(Plant Manager)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U. S. Courthouse, Federal Building, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101, Telephone 919-761-3212.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases Nos. 11-CA-6038
11-CA-6207
11-CA-6895

J. P. STEVENS & CO., INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO-CLC, SUCCESSOR TO TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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Cases Nos. 11-CA-6038
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AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO-CLC, SUCCESSOR TO TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

George Carson, II, Esq., of Winston-Salem, NC, for the General Counsel.

Joel Ronald Ax, Esq., of New York, NY, for the Charging Party.

Homer L. Deakins, Jr., Esq., and *M. Baker Wyche, III, Esq.*, of *Ogletree, Deakins, Smoak, and Stewart*, Atlanta, GA, for the Respondent.

DECISION

Statement of the Case

BERNARD RIES, Administratrive Law Judge: These cases[1] were heard in Halifax and Roanoke Rapids, North

1. Pursuant to a settlement agreement reached at the hearing, Case No. 11-CA-6285 was severed from the consolidated complaint.

Carolina, and Washington, D.C., on 17 days in December 1976 and April 1977. The complaint, as amended at the hearing, charges that Respondent violated Section 8(a)(5) of the Act in various ways, the principal allegation being that in a two-year period of bargaining for an agreement, Respondent "negotiated with the Union in bad faith and with no intent of entering into any final or binding collective-bargaining agreement."

Briefs were received from all parties on or about July 15, 1977, and they have been most carefully considered. Upon the record,[2] the briefs, and my observation of the witnesses, I make the following findings of fact and conclusions of law.

I. Jurisdiction

Respondent is a Delaware corporation with manufacturing facilities in various states. During the 12 months preceding issuance of the complaint, a representative pe-

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2. The transcript of proceedings is hereby corrected as follows:

Page	Line	Change	To
108	15	disagreement	this agreement
247	24	Strong	Strawn
559	14	old	all
756	16	test	dust
866	15	Subdivision, Question	Subdivision A, Question II
878	2	opposing	proposing
891	21	31(c)	30(c)
902	19	vestment	vesting
943	13	indication	invocation
943	18	unbalanced	on balance
1137	22	fare complee	a *fait accompli*
1249	25	imprudent to	imprudent not to
1366	20	15th and 15th	14th and 15th
1403	16	Step-by-State	step-by-step
1403	23	know,	known little,
1457 (a)	15	39	30
1466	13	September	December
2374	9	forms	forums
2384	14	disseminated	assimilated

riod, Respondent engaged in transactions which clearly qualify it as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the answer admits and I find.

II. The Status of the Labor Organization

The answer to the complaint admits that Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC ("ACTWU"), is a labor organization within the meaning of Section 2(5) of the Act. Respondent argues, however, that ACTWU is not, in law, a successor to Textile Workers Union of America, AFL-CIO ("TWUA"), which was certified in September 1974 as the exclusive representative of a bargaining unit consisting of production and maintenance employees in Respondent's seven plants at Roanoke Rapids, North Carolina.

The record shows that in 1975, the Amalgamated Clothing Workers of America and TWUA began a process which ultimately resulted in the merger of the two labor organizations in June 1976. In *American Enka Company*, 231 NLRB No. 140, after considering the circumstances of the merger, the Board held that "ACTWU is the continuation of Textile and therefore has succeeded to its representation rights" (sl. op. p. 8). That conclusion is, of course, dispositive here, I further note that although the Board stated in *America Enka* that "participation or ratification" by the employees in the bargaining unit there involved was "not required," it did discuss the extent to which the unit employees had participated in the merger. Unlike that case, where there was no employee participation, here the local membership elected delegates to the TWUA convention which adopted the merger resolution.

Accordingly, I conclude that ACTWU is a legal continuation of TWUA, and has been and is entitled to the recognition previously accorded the latter organization.

III. The Issues; Background

The consolidated amended complaint presents a number of issues categorized as violations of Section 8(a)(5), the section of the Act which requires an employer to bargain in good faith with the exclusive representative of his employees. The complaint touches every level of the bargaining relationship, from an assertion that Respondent unlawfully withheld information bearing upon the relative efficiency of a discharged loom operator to a claim that Respondent failed to bargain about a transfer of $19 million in profit-sharing funds; from a charge that Respondent unilaterally changed a double-shift time-off practice in one plant to a contention that Respondent negotiated for some 2 years with the Union "in bad faith and with no intent of entering into any final or binding collective-bargaining agreement." While the latter allegation clearly occupies center stage, General Counsel contends that the lesser allegations, much litigated, not only constitute separate and independent violations of Section 8(a)(5), but also indicate a cast of mind corroborative of the claim that Respondent dealt in bad faith at the bargaining table.

I shall first consider the separate allegations of unilateral action and refusal to furnish, or delay in furnishing, relevant information. Some background may be helpful.

The Union was certified in 1974 as the bargaining representative of some 3000 employees in seven plants at Roanoke Rapids.[3] Shortly after certification of the Union, the Union requested, and the Respondent agreed to, the establishment of a procedure, apart from the contract negotiations, for the processing of grievances, channeling of requests for information, discussion of operational prob-

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3. Altogether, Respondent operates about 85 plants with 40,000 employees, mostly in the Southern states.

lems, and the like, usually referred to in the record as the "Strawn-Gardner" procedure.[4]

After Strawn's early deparature, the chief local representative of the Union in this procedure was Clyde Bush; the other active representative was Cecil Jones. While both also served on the Union negotiating team, it appears that neither possessed major authority in the area.

Aside from Gardner, who also moved on in February 1975, acting as primary liaison for Respondent to the Union was Roger Warren, the Personnel Coordinator. To the extent that resolutions of conflicting testimony are important hereafter, I generally, with the exceptions noted, found the Union's witnesses more credible.

IV. The Alleged Unilateral Actions

A. *The Change in the Double-Shift Time-Off Practice*

The complaint alleges, "On or about September 1974, Respondent unilaterally changed its policy of awarding bargaining unit employees one hour of free time with pay, whenever they worked consecutive shifts, to a policy whereby said employees were accorded therefor only 15 minutes free time with pay."

Evidence bearing on the alleged change related only to the Patterson plant. Donald Phillips, an employee for 10 years, testified that, prior to the representation election, whenever he had worked an extra shift in conjunction with his regular one ("a double"), he had been allowed one hour of free time—that is, he would be paid for eight hours of extra work, even though he actually worked only seven

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4. Named after the two original party representatives, Strawn for the Union and Gardner for Respondent.

hours. He would take the free hour between shifts, as would some of the other employees. About a week or so after the August 28, 1974, election, his supervisor, W. D. Hovis, told him that this policy was going to change. A few days later, supervisor Wilbur King, in asking Phillips to work a double, said that he would be allowed only 15 minutes of free time. Thereafter, Phillips testified, he only took 15 minutes off when he worked a double.

Betty Hancock, a weaver since 1973, also testified to having received a hour of free paid time when working doubles, which she did some three times a week. Hancock usually took the free time at the end of the extra shift. She further stated that in about October 1974, supervisor Harry King asked her to work a double and told her that she "would have only 15 minutes off without pay." Thereafter, she took no more than 15 minutes free time when working a double.

Similar testimony as to the past practice was elicited from 11-year employee William Biggs, who said that after the election, supervisor Hutchinson "came to me and told me . . . that I would only get paid 15 minutes of the hour." Biggs thereafter was only asked to work a few doubles, but he continued to take a full hour off.

Respondent introduced minutes of a Patterson plant general overseers' meeting held on November 5, 1971, which, in part, announced a policy that, starting December 1, employees working double shifts would only be paid for 15 minutes of free time, although they could be permitted to take additional time off without pay.[5] The prior policy had apparently been to allow employees an hour of free time. There were indications from supervisory witnesses, however, that the new policy was not strictly hewed to

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5. This was designated on company records as .3 of an hour, thus amounting in fact to 18 minutes.

after 1971. Weave room supervisor Rufus Turner, for instance, testified that, both before and after 1974, "(i)f I needed an employee in order to keep my job running, I paid him eight hours . . . (r)egardless of whether he worked the full 8 hours." James Cranford, the superintendent of the Patterson plant, testified that the announced limitation remained the official company policy after 1971, and was referred to at overseers' meetings periodically. When asked if he suspected that his supervisors had been allowing employees an hour of free time despite the formal policy, Cranford said, "Some of my department heads might have been aware of it, I don't know . . . at times we do suspect things."

Supervisor W. D. Hovis testified in support of the asserted policy, but was not asked to specifically deny the conversation testified to by Phillips. Hovis did say he had never "knowingly" allowed more than 15 minutes paid time off. Supervisors Wilbur King, Harry King, and Hutchinson were, without explanation, not called by Respondent to deny the claims of employees Phillips, Hancock, and Biggs that those foremen had expressly announced the 15 minute limitation to them in the autumn of 1974. Patterson supervisor James Nix testified that the three employees had worked extra shifts for him in 1974, and that he did not "knowingly" grant them a full hour's pay if they took off more than 15 minutes.

Employee Joyce Blackwell testified on rebuttal, however, to two specific occasions on which she had worked doubles for Nix prior to September 1974 and received an hour's free time; in one of these instances, Nix had escorted her to the plant gate, in order to open it, an hour before the second shift had ended. That supervision had been fully aware of the early departure of doubling employees was indicated by the testimony of employee Helen Acree

that, prior to the election, replacements would be dispatched by supervisors to work the final hour of the shift, and one of the supervisors would open the gate to let out the doubling employees.

The documentary evidence—timecards of the employees—is not capable of resolving the dispute, since the raw figures of compensated time shown thereon may represent a variety of situations. The cards of William Biggs, however, tend to support his testimony. Biggs' timecards for the period January-October 1974 show what appear to be doubles worked on a number of occasions, and each time he received credit for 8 hours for the extra shift. But for the week ending November 9, when he worked overtime on 3 days, he received credit on each of those days of only 7.3 hours, and the same credit was given for overtime work on his only other apparent double thereafter, a day in the week ending December 7. Since Biggs testified that, after the change in policy, he continued to take an hour off, the records suggest that it was not until beginning late 1974 that he was compensated for only 15 minutes of that hour.

The employee witnesses were all persuasive; the company witnesses were not, and, in fact, supervisor Turner partially corroborated the testimony of the employees. On the whole of the evidence, I conclude that the prior free-hour policy was altered in 1974. It further appears to me that the change was not simply the product of independent decisions by some supervisors to more strictly apply the 1971 statement of policy, but was the result of a deliberate and coordinated determination; the uncontradicted testimony of Phillips, Hancock, and Biggs makes it clear that four different supervisors went out of their way to notify the employees that they would no longer be permitted the accustomed free hour.

The free hour obviously had been for years the established working condition for doubling employees, known to supervisors and employees alike. It is evident that the policy announced at the overseers' meeting in 1971 had been ignored in practice. Its sudden and unilateral resurrection soon after the Union victory in the election constituted a substantial change in the prevailing terms of employment, a change about which the Respondent was bound by law to consult with the Union. *Tiidee Products, Inc.*, 176 NLRB 969, 976. Even if it were true that Respondent's higher officials were unaware of the lapse and revitalization of the rule, it seems clear that the consciously concerted change of practice by a covey of supervisors must be deemed company action for which Respondent should be held responsible. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 519-521 (although management was unaware of the activities of its supervisory staff, "[t]he question is not one of legal liability of the employer in damages or for penalties on principles of agency or respondeat superior, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes."); *Riggs Distler & Co. v. N.L.R.B.*, 327 F. 2d 575, 579 (C.A. 4).

B. *The Change in Computing Holiday Pay*

The complaint alleges that Respondent violated Section 8(a)(5) in that "on or about December 1974 and January 1975, Respondent unilaterally changed the method of computing holiday pay for bargaining unit employees at the Fabricating Plant, thereby reducing the holiday pay for those bargaining unit employees."

On March 13, 1975, in reply to an earlier Union complaint, Respondent wrote that it had become aware, prior

to the 1974 Christmas holiday, that "[f]or several years Holiday pay for employees working on piece rates or incentive jobs at the Fabricating Plant had been computed differently than at the other Roanoke Rapids Plants," and that the method thus used at the fabricating plant "throughout those years, was erroneous." The letter volunteered that, upon discovery of this fact, the normal method of computation was instituted at the fabricating plant for both the 1974 Christmas and the 1975 New Year's holiday pay, resulting in a diminution of pay.

Clyde Bush testified that Respondent continued to pay by the new method until August, thus affecting the July 4 holiday as well. In August, Bush testified without contradiction, Roger Warren told him that Respondent intended thereafter to revert to the former method by which holiday pay for fabricating employees had been computed.

Respondent argues that Respondent's action "amounted to no more than correction of a clerical error." It did not, however, adduce any evidence that, in fact, the prior computation of holiday pay had been contrary to established company policy, and Bush's credited testimony that Warren had notified him in August that Respondent was reverting to the former method of calculation strongly suggests the nonexistence of such a policy. I find, therefore, that Respondent unilaterally altered an existing condition of employment in December 1974 and thereafter, in violation of Section 8(a)(5).

C. *The Unilateral Choice of a Respirator*

As amended at the hearing, the complaint in Case No. 11-CA-6895 alleges that "Since on or about October 1976, Respondent unilaterally chose for installation and mandatory use by bargaining unit employees affected the Dustfoe 88 respirator."

Prior to December 1976, employees at Roanoke Rapids were not required to wear respirators (masks which filter out cotton dust), but they could do so on a voluntary basis. The mask in use was called a "3-M 8710," a light, single-use, disposable respirator, which had the approval of the Occupational Safety and Health Administration.

In early November 1976, acting upon complaints filed by the Union, the North Carolina Department of Labor found that Respondent had violated the state Occupational Safety and Health Act by allowing about 150 employees in certain areas of two plants to be exposed to excessive cotton dust without respirators. The citations ordered that OSHA-approved respirators be used beginning December 27 and 28.

The Union soon made inquiries as to whether Respondent would appeal or comply with the citations; Warren testified without contradiction that he told Cecil Jones on November 29 that Respondent would not appeal.

On Wednesday, December 15, as subsequently discussed in the section on alleged refusals to supply information, the Company briefly advised the Union, in an evening meeting, that it had concluded that, in order to remedy the citations, a type of respirator called a "Dustfoe 88"—permanent, heavier than the 3-M 8710, and requiring maintenance—should be used by the affected employees, and it expressed a desire to begin training the employees on Friday or Saturday and to start using the respirators on Monday. At a lengthy meeting on the evening of December 16, attended by Eric Frumin, the Union's expert in occupational health, who had flown in from New York, the Union asked Respondent for various kinds of informatin relating to the Dustfoe 88 and the cotton dust problem. Not all the requested information was supplied, as detailed *infra*.

At the end of the meeting, Warren told the Union that since he did not believe he could obtain all the requested information by the abatement date of December 27, Respondent intended to proceed with the instructional phase of the program on the last working shift of the week (either the following day or the one after that). Warren testified that the Union stated that it would prefer that the Company continue using the 3-M 8710 respirator until its questions were answered, and that, until such time, it "didn't agree with the program." The program was nonetheless put into effect and the employees began wearing the Dustfoe 88 respirator the following Monday.

The record shows that Corporate Medical Co-Director Theodore Hatfield had decided by August 1976 that the most suitable respirator for general use by Stevens' employees was the Dustfoe 88, and his recommendation to this effect was approved by Respondent's Management Advisory Committee in October. Upon Hatfield's recommendation in August, Group Personnel Manager Tandy Fitts purchased 300 such respirators for future use at Roanoke Rapids. After the November citations had been issued, and after Hatfield had determined that the exposed employees at Roanoke Rapids were capable of wearing the Dustfoe 88, he formally recommended to Fitts on December 9 or 10 that Respondent comply with the citations by using the already-purchased Dustfoe 88 masks.

As explained by General Counsel at the hearing, the offense alleged here is not "the institution of mandatory use" of respirators, which was in fact mandated by the citations, but rather the "unilateral choice of the type of respirator." Respondent's witnesses carefully testified that, in discussing the matter with the Union on December 15 and 16, they only "proposed" use of the Dustfoe 88, rather than other types of respirators; testimony presented by General Counsel indicated that Respondent announced

a decision to do so. It seems probable that a tentative, though not necessarily unalterable, decision was announced. I will find, *infra*, that relevant information requested by the Union on December 16 was not then supplied. In the face of that omission, together with the Union's stated preference for continued use of the 3-M 8710 until its questions were answered, it must be concluded that the decision to proceed with the Dustfoe 88 constituted unlawful unilateral action.[6]

Even apart from the factor of unsupplied information, however, the evidence discloses a failure to meet the standards of Section 8(a)(5). Respondent knew by at least November 25 that it would have to use some sort of respirator by December 27.[7] It also knew that it had a stock of 300 Dustfoe 88 respirators and that Dr. Hatfield had previously recommended the use of that type of respirator, a recommendation adopted by the Management Advisory Committee. There could scarcely have been any question that, after Hatfield examined the employees as to their capability for wearing respirators, he was going to recommend the use of that model.[8]

Between November 25 and December 9 or 10, when Hatfield made his "recommendation" to Fitts, nothing was said to the Union (which was unaware of the August purchase of the Dustfoe 88) about the likelihood of using the

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6. I have no doubt that the choice of one of several respirators, having substantially different characteristics materially affecting the employees who must use them, is a mandatory subject of bargaining. *Gulf Power Company*, 156 NLRB 622, enfd. 384 F. 2d 822 (C.A. 5); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 222 (concurring opinion, Mr. Justice Stewart): "[W]hat safety practices are observed . . . would . . . seem conditions of one's employment."

7. The citations had a limited appeal period of 15 working days. They were issued on November 3 and 4.

8. Hatfield testified that he thought "it was common knowledge that that was the respirator that I preferred."

Dustfoe 88 rather than the familiar 3-M respirator. Between December 10 and the evening of December 15, nothing was said to the Union about the Dustfoe 88, even though Respondent knew well what it was going to propose, and knew further the time constraints imposed by the abatement order.[9] Given such constraints and such knowledge, the wholly unreasonable failure to afford the Union prior notice and adequate opportunity to investigate and examine all aspects of the Dustfoe 88 makes the relatively brief essay at bargaining on the evening of December 16, a day or two before the program was to be undertaken, an obvious charade.

Respondent cites *N.L.R.B. v. J. P. Stevens & Co., Inc.*, 538 F. 2d 1152, 1162 (C.A. 5), for the proposition that an employer must give a union "a meaningful chance" to offer counterproposals and counterarguments. I fully agree, and conclude that no such "meaningful" opportunity—which *ex necessitate* must include time to study, consider, and evaluate—was given here. *ILGWU v. N.L.R.B.*, 463 F. 2d 907, 919 (C.A.D.C.) ("Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining.").

I conclude, therefore, that by unilaterally determining that the Dustfoe 88 should be used by employees in December 1976, Respondent violated Section 8(a)(5).[10]

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9. Warren testified that he attempted 10 times on Friday, December 10, to contact the Union, and then again on Monday, but could make no contact until Tuesday. Since the Union representatives were present at the first day of this well-publicized hearing on December 13, it certainly should have been simple to make contact.

10. Respondent raises a question as to the *bona fides* of the Union in this matter. At the beginning of the December 16 meeting, the Union asked permission to post notices at the plant announcing employee meetings to be held starting that evening at which Frumin would explain "the new company requirement

(Continued on following page)

D. *The Change in Vacation Eligibility Date*

The complaint in Case No. 11-CA-6895 alleges the following violation of Section 8(a)(5):

> Notwithstanding the Union's January 7, 1977, request to bargain with respect to Respondent's proposal of January 5 to change the employee eligibility date for vacation benefits, on January 10, 1977, Respondent unilaterally implemented its proposed change in the employee eligibility date at the Roanoke Rapids plants.

On January 6, 1977, Warren discussed with Bush a proposed change in vacation eligibility requirements, which would have brought the eligibility date for vacation leave for employees with more than 5 years service into line with the existing eligibility date for vacation pay. At that

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Footnote continued—

of wearing Dustfoe 88 respirators on the job . . . and . . . answer your questions." Although Frumin did not so testify, Warren gave some extremely confusing testimony which, in places, may be read to mean that the Union offered to waive discussion about the respirator if the Union was allowed to post the notices. Warren pointed out to the Union that the customary communication channel for the Union was leafletting, and refused the request for posting.

Construing Warren's testimony in its most favorable light, the implication is that the Union had already capitulated on the Dustfoe 88 and was willing to settle for a chance to discuss it with employees. Given the history of the Union's abysmal failure at convincing Respondent to change its mind about anything, which will be described hereafter, it seems very likely that, in December 1976 (at a time when this proceeding was underway), the Union believed any discussion about the respirator would be bootless. Frustrated in its proposal to communicate directly with employees, it also seems reasonable that the Union would have then, for whatever it was worth, have attempted one more time to serve in its role of employee representative.

In this posture, I do not consider the proposal of the notice to be an indication of Union bad faith. More pertinent, perhaps, is the Respondent's burdensome alternative of leafletting at the gates several thousand employees in the hope of catching 150 employees in certain departments who would be required to wear the respirators.

time, the parties had vacation proposals on the bargaining table. Bush told Warren that he "wanted to go back and look our proposals over."

The following day, at a grievance meeting, the two men again discussed the proposed change in policy, and Bush stated that he thought the appropriate forum for the matter was a collective bargaining session. Warren said the "change" proposed amounted to nothing more than bringing the leave practice into conformity with the practice obtaining with respect to vacation pay set out in the company manual, and Bush said he wanted to review the manual. On January 10 or 11, Bush received from an employee a retyped copy of a posted notice to employees which announced the policy change. At a meeting with Warren on January 14, Bush asked Warren for a copy of the posted notice. Warren said he was not sure that there was a notice, but if there was one, the employees could inform Bush of the contents of the notice.

Warren testified, *inter alia,* that after Bush, on January 7, suggested that the problem be resolved at the bargaining table, Warren explained the proposed change further. While Bush "stated he had no further questions in regard to it, he understood the eligibility date for the second week off," Bush also "did state that he wanted to go back and check his vacation pay policy." As indicated in Respondent's notes on the meeting, Bush said, "[Y]ou hold on to that until I can check my manual," and Warren said "Okay." After not hearing from Bush for 4-5 hours, Warren assumed the matter had been concluded, and proceeded to initiate implementation of the change, which immediately amounted only to the posting of notices advising employees to apply for a second week of vacation by February 1.

Plainly, when the January 7 meeting ended, Bush demonstrated that he had not necessarily exhausted his desire to discuss the change. It seems likely, however, that Warren simply interpreted Bush's subsequent silence as a relinquishment of further bargaining rights.

But if it be said that Warren acted unreasonably in thus guessing about the matter, there comes into play here a long line of cases holding that even when an employer announces a unilateral action, as Respondent, for the sake of argument, did by posting notices on January 10, the conduct will not be deemed unlawful if the union becomes aware of it and, having an adequate opportunity to request bargaining before actual implementation of the change, fails to take advantage of that opportunity. *Medicenter, Mid-South Hospital,* 221 NLRB 670, and cases cited at 678-679. The January 10 notice, of which Bush promptly received notification, afforded certain employees an opportunity to request a second week of vacation. The period for filing such requests did not expire until February 1. Thereafter, according to the notice, the requests would not be automatically granted, but would be "considered and fitted to the operational necessities of the plant."

Thus, the notice itself did not constitute a *fait accompli,* see *Southern California Stationers,* 162 NLRB 1517, 1543, and the information received by Bush on January 10 afforded him ample opportunity, before February 1, to say to Warren, who had displayed no aversion to discussing the matter, that he wished to discuss it further. See *ILGWU v. N.L.R.B., supra* ("actual implementation of a decision"). Bush did nothing after receiving notice, and thus waived whatever remained of the Union's right to negotiate. *U.S. Lingerie Corporation,* 170 NLRB 750, 751-752; *Kentron of Hawaii,* 214 NLRB 834, 835.

V. The Alleged Unlawful Refusals to Furnish Information[11]

A. *The Grievance of Brenda Futrell*

The complaint alleges, as an independent violation of Section 8(a)(5), that "Since on or about February 19, 1975, and at all times thereafter, until September 1975, notwithstanding the Union's request that it do so, Respondent withheld and refused to furnish information concerning the identity of and efficiency of certain weavers, to be used by the Union in carrying out its bargaining duties."

On January 31, 1975, Respondent notified the Union that it was considering the discharge of a Patterson plant loom operator named Brenda Futrell because of her low efficiency and high seconds.[12] At the Union's request, Futrell was given a one-week trial period in order to improve her performance. When the trial period ended, Respondent indicated that it still was inclined to terminate Futrell. On February 19, at a meeting concerning the discharge, the Company furnished the Union the efficiency ratings and, apparently, the efficiency standards of the five lowest weavers in the plant for the week ending February 8 (Futrell had the lowest), and also furnished the average efficiencies and percent seconds for a five-week period of the weavers on the other two shifts who worked on Futrell's set of looms (Futrell was the lowest).

The Union asked Respondent for the names and efficiency ratings of all loom operators on all three shifts

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11. While, in addition to the foregoing, one other transaction is specifically alleged to constitute unilateral action, that matter—involving the transfer of assets in Respondent's profit-sharing plan—can be more easily discussed after a proper context is laid further on.

12. A "second" is a defective product.

in the Patterson plant (a total of 90 employees) on a daily basis from December 21, 1974, to February 8, 1975.[13] The Union's request, rejected as "not pertinent," was renewed by letter of April 16, long after Futrell had been dismissed on February 22. On July 15, two weeks after the complaint issued containing the instant allegation, Respondent sent a letter which simply stated that Futrell and another employee "were the worst weavers at the Patterson plant with regard to low efficiency and high seconds."[14] In September, Respondent furnished the requested information.

Gardner testified that Bush asked only for the efficiency records of all weavers, and not also for their "efficiency standards." He said that the efficiency ratings alone would have been of no use to the Union because the standards "varied drastically" among sets of looms, and a comparison of efficiencies alone would have been pointless.[15] Nonetheless, after the February 19 meeting, Gardner discussed the request with Fitts and Warren, and called for

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13. While Bush testified that he also asked for the "seconds" records of the weavers, his letter of April 16, describing the earlier request, makes no reference to such records. I note, however, that the affidavit of Gardner states that Bush said on February 19 that he "wanted to compare her efficiency and seconds with other weavers." The emphasis, it would appear, was on efficiency records, not seconds data.

I do not believe the testimony of Warren and Gardner, which did not appear in Gardner's affidavit or Warren's notes, that when they asked why Bush wanted the data, Bush replied, "Just because I do."

14. Warren testified that after receipt of the April 16 letter, Respondent discussed the matter with its then counsel (Whiteford C. Blakeney) "several times" before sending the sparse July 15 reply.

15. Each loom operator works on a set of several different looms. A standard for each set is established which takes into account both the variety of the looms in each set and environmental factors. Thus, Respondent argues, there can be no meaningful comparison between two operators who each have 75 percent efficiency rates if the standard applicable to one is 80 and the other, 90.

and reviewed the efficiency records containing the information requested.

Despite his testimony that the efficiency information requested by the Union would have been useless, Gardner did give the Union the efficiencies of the five lowest weavers in the plant, evidently with the accompanying standards, which seems to indicate that Respondent regarded such information as being of some value. Gardner further testified that he never pointed out to the Union that the efficiencies were of no significance without the related standards. The record shows that the data sought by the Union was easily available; in fact, as indicated, Gardner examined the documents after the Union made its request.[16]

It would seem that the requested efficiencies would have been of some use to the Union. Even though Respondent had already supplied the efficiencies of the five worst weavers in the weave room, it might have been that these were just barely worse than the great majority of the others, a helpful debating point in the Futrell grievance. The records might also have been used, as Bush testified, to verify the claim as to the identity of the worst weavers. Assuming that the Union did not expressly request the relevant standards in February, it might well have done so had it received the efficiencies and realized that the standards would be of assistance in analyzing them.[17]

In any event, the Union's April 16 letter asked for the "efficiency standards and . . . efficiency ratings on a day to day basis from December 21, 1974, to February 8, 1975."

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16. The daily data was not preserved, but it was retained in weekly summaries.

17. Bush testified that he would have sent the information, if received, to the Union's industrial engineering expert in New York.

That request, which was not satisfied until September, emasculated the basis for Gardner's refusal. The Board stated in *Ohio Power Company*, 216 NLRB 987, 991, quoting *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 439, "The test of relevancy is similar to that in discovery; 'the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.' " And, in *N.L.R.B. v. J. P. Stevens & Co., Inc., supra*, 538 F. 2d at 1164, the Court said that "requested data must be supplied unless it is plainly irrelevant." The information requested here can scarcely be deemed "plainly irrelevant." Since it is manifest that the information sought was readily available and not confidential, no valid objection to its production appears; and since the data might have been of use to the Union, I conclude that by the delay in furnishing it, Respondent violated Section 8(a)(5).[18]

B. *Information Relating to Terry Inspectors*

The complaint, as orally amended at the hearing, alleges that Respondent violated Section 8(a)(5) in that "Since on or about July 9, 1975, and at all times thereafter, until September 17, 1975, notwithstanding the Union's request that it do so, Respondent withheld and refused to furnish certain data relating to the jobs of terry inspectors for the Union to use in carrying out its bargaining duties."

In March 1975, Respondent notified the Union that it intended to remove a work element from the job of the

18. Assuming the truth of Respondent's testimony that Futrell's attendance was not up to par, it was her work performance which plainly was critical, as stated in Warren's letter of July 15. And even though her poor record as to seconds may have played a part, the obviously central importance of her efficiency ratings makes the Union's lack of emphasis on seconds an immaterial consideration.

terry inspectors in the fabricating plant. At that time, Respondent furnished the Union with the present, as well as the proposed, "factors and frequencies" of the job. According to Bush, Warren said that the employees "wouldn't suffer any loss of earnings" if they continued to work at a proper pace. The change, however, required a revision of the rates applicable to the other elements of the job. Although the Union opposed the change, it was implemented. A few days later, Respondent informed the Union that it was also removing the same element from the jobs of the two other inspectors, fringe and overlocking.

According to the somewhat confusing testimony of Bush, at some time after the job changes were made in April, certain terry inspectors complained to him that they were losing money as a result of the changes. Bush then asked the Company for particular information relating to the revised job. When he did so is unclear. On July 9, Bush wrote the Respondent, saying that "[o]n April 4, 1975, we requested from the company a description of a terry inspector's job—what their production standards are and what their rates are on each style." At the hearing, however, Bush conceded that he did not request the rates until some time after April 14.

Bush testified that one of the complaining employees gave to him a "rate sheet" which had been handed out to the terry inspectors. That this sheet very likely in fact apprised Bush of the information requested on July 9 was conceded by Bush.[19] Bush further conceded that he attended a meeting on the matter with Company representa-

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19. "What we had requested before, we had requested on fringe and overlocking inspectors, and this letter *re-requested it on terry inspectors;* and what we were requesting from the company was the rates and the production standards *as the employee had already brought and give me,* what the new rate was, and what the production standard was.

tives prior to July 9, at which time he "probably" had with him the rate sheet given him by the employee. In addition, he thereafter was permitted to enter the plant and observe the terry inspectors at work, when Respondent's representative admittedly "discussed the job description" with him.

Warren testified that on April 23, the job content of terry inspectors was discussed with Bush, and that on May 14, there was a discussion with Bush of the written production standards and rates handed out to the terry inspectors on April 8. In testifying to the May 20 plant visit by Bush, Warren said that Bush asked for a copy of the new and old rates, but Warren "explained to him at that time that based on the fact that the terry inspectors had already received them on April 8th and our meeting on April 14th that he already had the new rates and since they were comparing it to the old rates I also felt that he had the old rates."

The complaint indicates that information given to the Union on September 17, 1975, satisfied the obligation created by the July 9 request. The handwritten "job description" received in September is a simple five sentence narrative of the basic physical functions in a terry inspector's job. If that was all that the Union requested in the July 9 letter, it had the fundamental information from the start. The "proposed prescribed factors and frequencies" given to the Union in April seems to be a useful analysis of the job, perhaps more useful (although not as graphic) than the simple description furnished in September. As to the "production standards" and "rates" requested in the July 9 letter, Bush conceded that the document received from Respondent on September 17 was essentially the same document given to him in April by a terry inspector, which he "probably" had used in a meeting with Respondent's agents prior to July 9.

Despite the foregoing, however, it seems certain that Respondent was not entitled to withhold the information requested in the July 9 letter. Although Bush surely knew what the job consisted of, he as surely had a right to see the Respondent's official version of it.[20] Although Bush might well have assumed that the "rate sheet" he had received in April was the only effective one for terry inspectors, he was not bound to rely on that assumption.[21] Indeed, that Bush had ground for questioning the accuracy of the rate sheet he had in hand is indicated by Warren's concession that, to the Union's knowledge, Respondent had made a "clerical error" in new rate sheets given to the overlock inspectors during the same period of time. Bush's reasons for requesting the information are easier to discern than those given for Respondent's 9-week delay in furnishing it. Warren's concession that he told Bush on May 20 that he could not have a copy of the new rates because Bush "already had the new rates" from an employee seems peculiarly recalcitrant when referring to a three-page document.

I conclude, accordingly, that by the two-month delay in furnishing such information, Respondent violated Section 8(a)(5). *N.L.R.B. v. May Aluminum, Inc.*, 398 F. 2d 47, 51 (C.A. 5) (a two-month delay deemed unreasonable).

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20. While Warren's testimony suggests that the job description furnished in September was specially drawn up at that time, it is too vague to support such a finding.

21 *Anaconda Wire & Cable Co. v. N.L.R.B.*, 444 F. 2d 1028, 1036 (C.A. 7): "[E]ven if some information were available to the Unions through employees at the Company contends, this does not relieve the Company of its duty to supply such information directly to the Unions. [citations.]"

C. *Information Relating to the Respirator Requirement*

The complaint in Case No. 11-CA-6895, as amended at the hearing, alleges that Respondent violated Section 8(a)(5) in that "Since on or about December 16, 1976, and at all times thereafter until February 16, 1977, notwithstanding the Union's request that it do so, Respondent withheld and refused to furnish information to the Union pertaining to Respondent's requirement that employees in certain departments wear respirators."

On September 7, 1976, Frumin, the Union's expert on occupational health, consulted with a Company representative in Roanoke Rapids on the cotton dust problem in the plant and the Company's dust testing program, and presented the Company with a written list of 20 specific questions regarding those matters. No answers were immediately forthcoming. In early November, the North Carolina Department of Labor, as stated earlier, issued two citations against Respondent. When Frumin received copies of the citations, he asked Bush to ascertain what Respondent was going to do about them, but apparently the first substantive reply was when Jones was told by Warren on November 29 that Respondent would not appeal. Warren testified that at a meeting on December 7, the Company offered to supply the information requested in September, but the Union said it would prefer to wait until Frumin was present.

On December 15, as stated, Respondent notified the Union about the use of the Dustfoe 88. At a 5-hour meeting with the Company on December 16, with Frumin in attendance, Bush presented Warren with a letter asking a number of questions relating to the problem of cotton dust. The letter also reiterated the request for informa-

tion made on September 7.[22] Respondent did not answer some of the new questions propounded on December 16, but at a recorded meeting on February 16, 1977, supplied the missing information.

The first set of questions presented on December 16 related to (1) the source of the Dustfoe 88 masks to be used, (2) the identity of the persons who recommended the masks, (3) the alternative masks considered, (4) the timing of the decision to buy the masks, and (5) the qualifications of the persons who recommended and purchased the masks. Frumin testified that Company representatives refused the requested data, saying they could not understand the Union's need for the information. Warren testified, however, that item (2) was answered by identifying "Corporate Medical Director" as the person who recommended the masks.[23] The Union stated, as to item (1), that knowledge of the source was important so that it could be assured that second-hand respirators would not be used. Frumin also testified that knowledge of when the decision was made to purchase the masks was relevant because it might indicate that the Company had not made a deliberate judgment. He further stated that the Union asked for the identity of the persons who recommended use of the Dustfoe 88 because it considered the limitation to one type of respirator to be at odds with the normal respiratory protection program, since "no single respirator fits all employees."

Dr. Hatfield, who had not been present on December 16, testified for Respondent that, in his opinion, an answer to items (1), (3), and (4) would not be "an essential ingredient in the success or failure of" the Roanoke Rapids

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22. This information was supplied.

23. Company representative Bobbitt testified that no name was mentioned.

respirator program. As to item (5), he at first thought that the qualifications of the individual responsible for the recommendation (but not purchase) of the Dustfoe 88 would be an "essential ingredient," but he then backtracked, saying that if the respirator was an approved one, the qualifications of the person recommending it would be irrelevant. He was not asked about item (2). On cross-examination, however, he agreed that if he were investigating the program, he might be interested in knowing whether the respirators were new or used; he would want to know what other respirators had been considered; and he thought it would be "helpful, but not essential," to know who had chosen the respirator and his qualifications.

On brief, Respondent agrees that, at the end of the December 16 meeting, items (1), (3), (4), and (5) remained unanswered. It seems probable that item (2) was answered by saying "Corporate Medical Director," as Warren testified, since when the information was eventually supplied in February 1977, this single question was not specifically answered. Respondent argues that the unfurnished information was not relevant. Even Hatfield agreed, however, that much of it would be worth knowing, and on their face, the questions appear relevant.

The second set of questions, seeking (1) copies of all studies indicating the levels of cotton dust, (2) a description of sampling techniques used in such studies, and (3) a calculation of 8-hour time-weighted average of the exposure to cotton dust of the employees who would be required to wear the masks, was met by a Company response that they would "check into it."

Hatfield's testimony on this group of questions was unclear. He seemed to be saying that certain documents previously obtained by Frumin from the Department of Labor did in fact show the levels of cotton dust, and that

the test results therein indicated the need for respirators; and he said, in regard to item (3), that they did show the 8-hour time-weighted average of "certain employees in the affected areas." He did not testify whether the documents also described the sampling techniques referred to in item (2). On cross-examination, Hatfield agreed that if he were asked to examine an unknown respirator program, he would ask for copies of any studies indicating the levels of cotton dust, since choice of a respirator may depend on the amount of dust.

Roger Warren testified that the Union had already (in August) been given copies of the first set of dust level studies in Respondent's possession, but that Respondent did not have the results in December of a second sampling which had been made. Dr. Hatfield, however, testified that as of December 10, he was already "reviewing the results of the second test."

It thus appears that as of December 16, Respondent had not given the Union copies of the second study relating to cotton dust (item (1)) which it had conducted and as to which, according to Hatfield, it had then received results. The Union was entitled to see the second study. As to item (2), it would appear from Warren's general testimony that a description of the proposed sampling technique for the second series of tests had been given to Bush on August 6, 1976,[24] and from Frumin's testimony on cross-examination regarding the first series, that the Union had secured an adequate description of the techniques used in the first set of Respondent's studies already received by the Union. Item (2) was thus adequately answered. As to item (3), Respondent states, based on Warren's testimony, that the information was given on January 31. No reason was given for the delay.

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24. "I indicated that the second dust samplings would be by the vertical elutriator method, and also personal samplings."

The third set of questions asked about (1) the medical procedures, other than pulmonary function testing, used by the Company to evaluate the ability of employees to use the Dustfoe 88; (2) the criteria used by the Respondent to determine whether an employee is capable of wearing the mask; (3) the identity of the persons who established and/or recommended the medical procedures and criteria; and (4) the identity of employees determined to be unable to wear the mask. According to Frumin, the Company responded only to the final item, saying that all carding employees had been determined capable of wearing the Dustfoe 88.

Hatfield testified, as to item (1), that an "interim corporate respirator program" earlier promulgated by him indicated what procedures are used by the Company, and that it also set out the criteria asked for in item (2). Warren testified that Respondent had in fact answered item (1) "on August 31 when I proposed that we perform the pulmonary function tests," referring to a discussion in which he had explained to the Union the pulmonary function testing which was about to be undertaken. This, of course, would not answer a question about tests "other than" pulmonary tests. He also said that on December 16, he replied to the third item by mentioning the medical director, and to the fourth as testified to by Frumin.

As to items (1) and (2), it appears to the untrained eye that the interim corporate respirator program, of which Frumin had obtained a copy, does contain procedures for testing the ability of employees to wear respirators and criteria for evaluating whether or not they should do so. However, it also appears that these methods are standard in nature and are, further, contained in a document, dated August 6, 1976, which designates the program as an "interim" one. There is no indication in the record that,

on December 16, Respondent even knew that Frumin had secured a copy of the program, and there was certainly no way for Frumin to know that the program was current. Why Respondent did not on December 16 refer to the program and affirm its currency is unexplained and inexplicable. I note that on February 16, in the minutes which record Warren's answers to the questions not yet responded to, Warren is shown as having spelled out the procedures requested in item (1), as if they had not previously been given, and also gave "the medical director" as the answer to item (3), although Warren testified he had supplied this answer on December 16. It thus appears that items (1), (2), and (3), all of which appear to request relevant information, were not satisfactorily answered on December 16.

The fourth set of questions sought information about the technical aspects of the jobs performed by the exposed employees ((1) prescribed factors, (2) frequencies, (3) element times, (4) totals, and (5 and 6) allowances for wearing and maintaining respirators, and for fatigue time), the letter noting that "a worker's wearing of a respirator may affect that worker's ability to perform his or her job at the same speed and efficiency." In discussing the matter, the Union emphasized that the respirator might place a burden on the employee's ability to perform, and the Company agreed to "check into it."

Hatfield disagreed with the premise of the questions, testifying that, in his opinion, the energy requirement of a Dustfoe 88 is so small as to have no practical significance. I am inclined to accept the opinion of Hatfield, an experienced professional, on this matter. Accordingly, insofar as the technical information was requested for the purpose of gauging the need for fatigue allowances, it would be irrelevant. That leaves the possible question of whether

the data should have been furnished in order to permit the Union to argue that allowances should be made for wearing and maintaining the respirator. But the record sheds no light on the value of the data in answering that question. It certainly appears to be a contention which could be made without reference to the particular factors and frequencies of the affected jobs.[25] The record is completely silent as to the meaning of "element times" and "totals," and, accordingly, I cannot assess their usefulness. I tend to believe that Warren told the Union, in answer to items (5) and (6), that no allowance had in fact been made; the answer was easy enough to give.

On the whole, I conclude that Respondent did not violate the Act by its response to this set of questions.

The fifth group requested information about the structure and content of the training program to be given employees about the use of the respirators. Warren told the Union the reasons to be given employees for the use of the respirators, and said that the supervisors would perform the training, after receiving verbal direction from the plant nurses. It would appear, in the absence of contrary evidence, that Warren adequately responded to this group of questions on December 16.

With respect to the sixth group of requests, asking for all documents and correspondence furnished by Respondent to the North Carolina Department of Labor regarding the levels of cotton dust at Roanoke Rapids, the level of employee exposure, and company programs for monitoring the health of exposed employees, Respondent said that it was aware of no such documents. The same response was given to the final request, which sought all plans, programs, and documents relating to the purchase or potential ac-

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25. The record shows that the Union had previously received the factors and frequencies for some of the jobs.

quisition of machinery or engineering controls for the abatement of cotton dust hazards.

Warren testfied that after December 16, he became aware that the former personnel manager of the Rosemary plant had in fact given the Department of Labor a copy of a Company health program for monitoring the health of exposed employees.

Despite that lapse, it would appear that, speaking strictly, Warren gave correct answers to the questions as posed. But Frumin also testified that Respondent said that no such documents "existed." While Warren may not have been aware that the Company interim respirator program had been given "to the North Carolina Department of Labor," his failure to mention the existence of such a program raises serious questions about Respondent's *bona fides*.

On the basis of the foregoing analysis, I find that Respondent violated Section 8(a)(5) by refusing to furnish certain easily accessible information promptly on December 16 and by delaying the submission of information until February 1977, a lapse of time which cannot be considered reasonable in the circumstances.[26]

VI. The "Hobson's Choice" Allegations

A. *Background*

As amended, the complaint contains four allegations relating to corporate-wide improvements in benefits made by Respondent over a 20-month period coincident with the collective bargaining negotiations. General Counsel as-

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26. It is of no consequence that after it received the information in February, the Union did not furnish it to Frumin. The value of the information obviously had diminished with the passage of two months.

serts that the conduct referred to constitutes both independent violations of Section 8(a)(5) and evidence of overall bad faith. The allegations, which may be denominated the "Hobson's choice" claims, are similar in construction; the following one is illustrative:

> Respondent, notwithstanding its failure to respond to the Union's proposals concerning Respondent's profit sharing plan, notified the Union on or about January 21, 1975, that it was announcing on that day an increase in employee benefits in its Profit Sharing Security and Retirement Plan at all of Respondent's nonunion plants, and, in bad faith, offered the Union the "Hobson's choice" of either agreeing to the announcement of identical benefits to the employees in the collective bargaining unit at Roanoke Rapids or of rejecting such benefits for those employees.

The other three allegations refer to wage increases in 1975 and 1976, and an improvement in the group insurance program in 1976. A similar situation, relating to the institution of a pension plan, was litigated at some length, but was not alleged as a separate violation.[27]

In all four pleaded "Hobson's choice" situations, Respondent did not in fact tell the Union that it had to choose

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27. I think it difficult, in a case of this magnitude, to determine when an issue has been "fully and consciously litigated" so as to justify finding a violation in the absence of allegation. At several places in its brief, Charging Party requests such findings. It is apparent to me that the General Counsel very carefully chose what issues to place before the Board; he amended the original complaint in writing on one occasion, and orally on others, and issued a second written complaint during the course of the hearing. In view of the very precise delineation of the issues by General Counsel in the complaints, at the hearing, and in his brief, and because, as stated, of the difficulty involved in ascertaining the existence of "full" litigation, my analysis of the legal issues will not stray from those framed by the amended complaints. Insofar as evidence clearly has been presented for its materiality with respect to intent and attitude, I shall, of course, consider it.

between "agreeing to the announcement" of the benefits or "rejecting such benefits." The record indicates that Respondent gave the Union to understand that it was making the announcement at the unorganized plants and that it would be willing to do the same at Roanoke Rapids or, in the alternative, withhold the announcements. On each such occasion, I believe the Union understood Respondent to be implying that it was willing to discuss the prospective improvements with the Union. In three of the four instances, the specifics of the improvements were not announced initially to the unorganized employees; rather, they were given only a preliminary indication of the new benefit.

A reasonable reading of the somewhat obscure "Hobson's choice"[28] allegations, given some acquaintance with the underlying facts, would lead one to believe the theory of the complaint to be something to the effect that the announcement of a benefit improvement at non-union plants and the simultaneous presentation of such a proposal to the Union at Roanoke Rapids was necessarily in "bad-faith," since the announcement would harden Respondent's position, and, at the same time, leave the Union with no real choice but to accept a benefit publicly being given to the unorganized employees.

In general, however, both General Counsel and Respondent argue these incidents as if the complaint simply alleged that Respondent bargained with a closed mind about the four improvements. I think the totality of the evidence supports such a conclusion. When considering an em-

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28. "Hobson's choice" is defined by Webster's as "a choice without an alternative; the thing offered or nothing." Interestingly, the reference is to one Thomas Hobson, "who let horses, and required every customer to take the horse which stood nearest the door."

ployer's willingness to bargain about such companywide increases, however, certain observations are in order.

There was considerable evidence presented by the Government at the hearing, mostly from subpoenaed documents, relating to the evolution of the benefit improvements, and the notion that Respondent unduly delayed informing the Union of its intentions as to these changes seems, occasionally, to play a part in General Counsel's argument: "Respondent concealed its intentions from the Union regarding the profit sharing supplement, the two wage increases, and the improvements in group insurance until a final corporate decision had been made." The manner in which the case was tried, and the latter argument, suggest that the Union was entitled to earlier notification than it received on each occasion.

It seems clear enough that an employer is entitled, as a general matter, to fully develop a proposal before presenting it to a union, as expressly stated in *The Lange Company,* 222 NLRB 558, 563, and again in *Joseph Macaluso, Inc.,* 231 NLRB No. 91, ALJD sl. op. p. 18. Although this principle normally applies, however, there may be circumstances where an employer plays his cards so close to his vest as to suggest a frame of mind inconsistent with that contemplated by Section 8(d) of the Act. Such circumstances will be discussed below.

Does the fact that an employer waits until it fully formulates a companywide proposal and then announces it to the union at its represented locations and simultaneously to its unorganized employees itself give rise to an inference of bad faith? The answer—not unusual in the case of such broad propositions—is perhaps, depending upon the circumstances. On the one hand, there is no precedent absolutely requiring an employer to refrain from such simultaneous announcements; on the other hand, when an em-

ployer adheres rigidly to a pattern of deliberately according no more information to the bargaining representative of a group of its employees than it is ready to disclose to the remainder of its employees, who are unrepresented, assiduously suppressing any possible bargaining advantage and enhancement of prestige which might accrue to the union by receipt of prior notice, the likelihood grows that the employer is not acting with that degree of open cooperation mandated by the statute.

Thus, there may be, within the episodes hereafter recounted, elements of conduct which themselves do not rise to the stature of unfair labor practices, but which nonetheless indicate an improper attitude toward the bargaining relationship, casting light upon the ultimate question of Respondent's good faith. "[A]cts not in themselves unfair labor practices may support an inference that a party is acting in bad faith," *N.L.R.B. v. General Electric Company*, 418 F. 2d 736, 757 (C.A. 2); *N.L.R.B. v. Tower Hosiery Mills, Inc.*, 180 F. 2d 701, 702 (C.A. 4) ("Although respondent's actions may not have constituted an unfair labor practice, this conduct tends somewhat to indicate respondent's unwillingness to bargain with the Union"); *Continental Insurance Co. v. N.L.R.B.*, 495 F. 2d 44, 50 (C.A. 2). These possible elements will be discussed below.

As seen by the parties, the basic question here is whether Respondent broached these four improvements with a mind impervious to change. While, as stated earlier, an employer ordinarily need only notify the union of a decision after reaching it, that decision may not, under Section 8(a)(5), be a "final" one. Given an employer's general right to withhold notification of a decision until it has been fully formulated, when that decision involves a complex corporate-wide benefit plan which the employer has spent many months evolving, it may be

said, as a practical matter, that the implacable force of corporate inertia will tend to carry it forward to consummation. The law, however, enjoins an employer who has made such a decision to retain sufficient flexibility of purpose as as to be receptive to union arguments and counterproposals which may result in rescission or modification of the plan, and to consciously brake against such inertia.

Overall, I must say that the evidence resonates with indifference on the part of Respondent to the role which Congress intended the Union to play in the collective bargaining system, and an absence of sincere interest in the needs the Union had in attempting to perform as an effective bargaining agent. This lack of involvement reflects, in my view, an *ab initio* decision that the Union was not to be permitted to so function—that its views, arguments, and proposals were to be ignored. In that respect, I differ with the occasional contention that the Respondent denied information or adequate notice to the Union because "it might be useful for real bargaining." That seems entirely too optimistic. I do not think the Company was in the least fearful of any use, but one, to which the Union might put information. The exception was the publicity advantage which the Union might enjoy from prior information. Respondent, I believe, was ready, if not willing, to talk about anything almost forever. It simply was not disposed to ever change its mind.

This is certainly not to say that the Company was not keenly aware of the nature of its statutory obligations to the Union. The evidence shows that Respondent carefully prepared its overtures to the Union about the benefit improvements, even devising scripts and scenarios to be used on some occasions. What is missing (and, indeed what the scripts inherently preclude) is any sense that Respondent intended to extend itself beyond the

first layer of requisite formalities and reach to the heart of Section 8(a)(5)—a true willingness to hear, consider, and change its mind.

Respondent contends that its good faith is palpably supported by the fact that it offered these improvements to the Union in the first place, pointing to a line of cases holding that an employer engaged in bargaining for a collective agreement may withhold from the represented employees, as a bargaining chip, benefits given to unrepresented employees. *Shell Oil Company*, 77 NLRB 1306, 1309-10; *McCulloch Corp.*, 132 NLRB 201, 213-14; *McGraw-Edison Company*, 172 NLRB 1604, 1609-10. However, as the Board pointed out in *Chevron Oil Company*, 182 NLRB 445, 449, that principle applies only in a "context of good-faith bargaining, and absent other proof of unlawful motive." It could be argued that, in deciding to offer these benefits at Roanoke Rapids, this Respondent did not wish to risk application of that test. And I think there is no question that once Respondent chose to offer these improvements to the bargaining unit, it was required to bargain in good faith about them. Cf. *Equitable Life Insurance Co.*, 133 NLRB 1675; *N.L.R.B. v. General Electric Company, supra*, 418 F. 2d at 746-749.

Consideration of the totality of the bargaining relationship as spread on this record leaves little doubt that on no occasion did Respondent bargain with the Union on any subject with that receptive state of mind required by the statute. It is therefore somewhat artificial to isolate certain transactions as individual violations. Given Respondent's evident frame of mind, one might as justifiably allege separate violations in each of the 500 cases of discharge and discipline in which Respondent, after hearing the Union's grievance, affirmed its original decision.

Nonetheless, since these matters are alleged and were litigated, they require (and merit) separate examination for the contributions they make to the question of general intransigence.

This is an appropriate juncture at which to provide some background about the bargaining process, since the events regarding these extra-contractual benefits generally occurred at the bargaining table.

Bargaining formally began at Roanoke Rapids on October 31, 1974, at which time the Union presented 17 proposals. Scott Hoyman, Southern Director of the Textile Division of the Union, who worked out of Charlotte, North Carolina, served as chief negotiator for the Union during most of the bargaining. William Du Chessi, then General Secretary-Treasurer of the Union, led the Union negotiating team at the beginning and later, around the summer of 1975, gradually faded out of the picture. Clyde Bush and Cecil Jones, among others, also served on the negotiating team.

From the start, Respondent's principal negotiator was William C. Little, Jr., who is employed in Respondent's Industrial Relations Department in Greenville, South Carolina. Also appearing with some consistency at the bargaining sessions for Respondent were Edwin Akers, Director of Industrial Relations for the Terry and Decorative Products Division, Allen Bobbitt, manager of the terry operations at Roanoke Rapids, Tandy Fitts, and Roger Warren. The General Manager of the Roanoke Rapids plants was N.S. Beeks, who first attended and then disappeared from the negotiating table about the same time that Du Chessi did.

A name often mentioned during the hearing was that of J.W. Jelks, who did not testify. Little, who is an untitled assistant to Jelks, tesitfied that Jelks, located in Greenville, is "Vice President of Industrial Relations for

the company," and the record indicates that Jelks had corporate-wide responsibility in the industrial relations area. Jelks reported to James Harrell, who bore the title of "Executive Vice President," who had "corporate-wide" authority, and who also was located in Greenville. The top executives of the Company were James D. Finley, chairman of the board and chief executive officer, and Whitney Stevens, president, both of whom were located in Respondent's New York office, as was Respondent's general counsel, Hastings Foster. Various members of Respondent's hierarchy were assigned to several committees which appear to possess considerable authority and whose membership was geographically dispersed; e.g., the Profit-Sharing Plan Committee was composed of Jelks, who served as the chairman, Little who was the secretary, Wards Burns, Respondent's New York-based comptroller, general counsel Foster, and two others.

The two principal witnesses were Hoyman and Little. Their testimony has points of contradiction, but not many. Hoyman was a particularly impressive, highly intelligent witness. Little also seemed bright and honest. The Bard noted, "There's no art to find the mind's construction in the face." Nonetheless, if I had to choose between two men who appeared to be sincere, looking them only "in the face," I would quickly select Hoyman. Furthermore, while the passage of time and events has probably eroded Hoyman's memory, that also is true of Little; but Little made positive assertions which I find highly unlikely.[29]

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29. *Dubitante*, I received in evidence copies of pretrial affidavits made by Hoyman and used by Respondent on cross-examination to refresh his recollection. *J.G. Braun Company*, 120 NLRB 368, 369, n. 3, holds it to be error not to receive affidavits so used when requested by General Counsel. I have not, however, examined the affidavits in preparing this Decision.

B. *The 1975 Profit-Sharing Floor*

The amended complaint charges that the allegation set out in the preceding discussion constitutes a violation of Section 8(a)(5).

The record shows that, since 1965, Respondent has maintained a companywide profit-sharing plan for its employees, the assets being held in trust by Morgan Guaranty Company. On November 8, 1974, the Union submitted a contract proposal asking that the amounts credited to employees' accounts be guaranteed.

On January 21, 1975, having made no counterproposal on the profit-sharing plan, Respondent announced at a bargaining sessions that it was proposing a supplement to the existing plan which would create a guarantee, or "floor," so that, regardless of any decline in investment value of the plan assets, the Respondent would, by its own assets, guarantee to withdrawing employees receipt of no less than the amounts contributed and credited on their behalf during a certain past period, that is, from the inception of the plan in 1965 through December 31, 1974. Little showed the Union a copy of the notice about the floor which was to be posted at all unorganized plants that same day, and asked if the Union wished the notice to be posted at Roanoke Rapids. Little said that he had only learned of the decision the previous evening, and, upon the Union's inquiry, stated that the decision was made by Respondent's board chairman Finley and president Stevens.

After some discussion, in which the Company educated the Union in the basics of the plan, and after a Union caucus, the Union agreed to the floor, without prejudice to further bargaining in the area. The Union, however, upbraided the Company for giving it short notice of a potentially complex matter, and for allowing the Union to be placed in a position in which it "might be criticized

by people in the Roanoke Rapids plants for not having accepted a benefit which the company was that day announcing at non-union plants."

Of particular interest is Hoyman's testimony that, in discussing the floor, he asked Little for "any other written information or analysis" relating to the floor, and was told that there were none. Little's pretrial affidavit states that Hoyman had asked, on January 21, for "projected costs and actuarial analysis," and that Little, explaining that the floor was not subject to accurate cost projections, had replied that he "was confident that there had been no such study made." At the hearing, Little at first affirmed that this was "an accurate statement of what I stated both at the time of the affidavit and in the meeting," although he later said that the exchange occurred on March 26. There is no dispute that, in a March 26 discussion about the floor, Little was asked for any such analyses, and subsequently reported that there were none. Little testified that, in investigating into the existence of such studies, he spoke to Jelks, his superior, and to the profit-sharing administrative center in Charlotte, North Carolina, neither of which knew about any studies.

Included in material subpoenaed by General Counsel were several documents containing analyses of company liability in the event of implementation of a guarantee of the profit-sharing plan and assumptions relating to the establishment of a floor. They were forwarded on December 27, 1974, by Respondent's comptroller Burns, in the New York office, to Finley, Stevens, Foster, and Harrell. The assumptions analysis contains a "major monetary factor" (deleted from the exhibit) which, the parties stipulated, was not incorporated into the floor later put into effect. The covering memorandum (not in evidence, but orally stipulated) contained the statement, "We cannot determine without actuarial assistance the cost to the company if the hourly

plan were to be continued with balances (as determined above) guaranteed plus [the abandoned major monetary factor] for present and future plan members."

It is thus obvious that the kind of information requested by Hoyman on January 21, and as to which Little expressed "confidence" did not exist, had been the subject of Company analysis. Whether portions of the documents in evidence, excluding the later deleted "major monetary factor," would have been useful to the Union is a matter about which I can only speculate, although it would appear that, even absent the "monetary factor," other data contained in the documents relating to assumed earnings and personnel information would have been of value.

What is immediately striking here is Little's expression of confidence that no such documents of any kind existed, and his later expressed inability to find any, even though the subpoena managed to elicit them. At best, one is forced to conclude that Little was not particularly interested in discovering what was available; at worst, that he misrepresented the matter. Considering that he told the Union that Finley and Stevens in New York had made the decision, it seems little short of reckless to have confined his much-delayed search for such information to inquiries to Jelks in Greenville and the administrative office in Charlotte.[30]

Missing from the evidence here is a definitive indication of when the final decision to institute the floor was made. We know that it was being actively considered at the end of December 1974. We know that Little testified that he learned of the decision on the evening of January 20, did not know prior thereto that it was being contem-

30. Little testified that he had not seen the subpoenaed material until shortly before his appearance at trial, and he then contacted the Charlotte office to find out if he had been misled when he had made his earlier inquiries.

plated, and had no more information about it than the bare notice which, he was told, was being posted that day in other plants. Respondent was in a position to clarify whether the decision itself was made on January 20 or weeks before; it did not choose to present any direct evidence on that question.

The question seems important because, if the decision substantially predated January 21, Respondent's determination to withhold it from the Union until the improvement could be announced at other plants might be seen as part of a recurring pattern, discussed hereafter, of curtailing the Union's state of knowledge as to improvements so that the Union learned nothing new until Respondent was ready to make the same announcement to unrepresented employees. This gambit—apparently attempting to preclude the Union from a position of prior knowledge which, Respondent feared, might allow it to trumpet a victory—obviously detracts from bargaining, since it both denigrates the stature of the Union and deprives it of additional time to study and explore proposals. In *Kellwood Company v. N.L.R.B.*, 434 F. 2d 1069, 1073 (C.A. 8), the Court recognized the implicit lack of good faith in such a tactic, noting, as part of the employer's campaign to "embarrass and undermine the union," that the announcement of wage increases at the employer's unorganized plant "was simultaneous to the first communication of the same offer to the union."

It seems quite clear that both sides understood the pressure which the Union felt when offered a benefit being announced at other plants the very same day. In fact, the Company's notes for the meeting of January 21 show that after the Union reproved Respondent for not consulting the Union "before the announcement was made in other plants," the following occurred: "Little said that as to

the statement made by Du Chessi we felt a definite need to make the union aware of this change at the earliest possible time and before it ever went up in the other Stevens plants as a notice." It would appear that this felt "definite need" did not thereafter reassert itself, as later discussed.

Little's testimony that he had no knowledge of the floor prior to January 20 is suspect. As noted, Little was secretary of Respondent's Profit-Sharing Plan Committee; Jelks, his superior, was the Committee chairman. While possible, it seems rather unlikely that Little had been completely in the dark on this plan improvement until the evening before its announcement. But taking his testimony at face value, the question arises as to how Respondent expected Little to competently bargain over a subject as to which he assertedly knew no more on January 21 than any rank-and-file employee in the unorganized plants who read the same notice that was purportedly read to Little on January 20.

It is true, as Respondent points out, that the testimony indicates that the floor was made retroactive to January 1, 1975, and that there was no actual urgency involved—the Union could have bargained for months before agreeing to the floor, and, when and if it eventually did so, all employees who had become entitled to withdraw funds from the plan during the interim would have been retroactively covered against any loss in their accounts when such agreement was finally reached. But there is no indication that either Little or the Union knew that on January 21, or indeed, that Little was possessed of any knowledge beyond the bare bones of the posted notice. The Union may have felt that immediate losses could accrue to withdrawing employees if agreement was not immediately reached; the

thrust of Little's own testimony is that he was in no position to positively assure the Union otherwise.[31]

When the Union asked for information on January 21, and again on March 26, Little at first made an erroneous guess that no studies had been made, and later was unable to find the analyses that in fact existed. Giving Respondent the best of the matter, it must be said that it sent an uninformed, unprepared negotiator bearing a "proposal" which he was unable to speak to, much less negotiate.

C. *The Unilateral Actions Regarding the Profit-Sharing Fund*

I earlier noted a remaining complaint allegation of unilateral action which might better be discussed in context. The foregoing description of the establishment of the floor provides such context.

The amended complaint alleges the described conduct as a separate violation:

> On or about January 15, 1976, Respondent unilaterally changed its employee profit-sharing and retirement benefit plan by authorizing the investment of its assets at a fixed rate of interest, thereby unilaterally eliminating its supplement to said plan, said supplement having been instituted in January 1975.

The funds held in trust by Morgan Guaranty under Respondent's profit-sharing plan were, as of 1975, principally invested in common stocks, making the trust assets subject to market flutuations. Subpoenaed documents

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31. Little testified that, routinely, payments are not made to withdrawing employees during the first few months of each year so that accounting may take place, and such employees are customarily paid only thereafter. This past practice, however, would not necessarily have guaranteed that the floor would have covered terminated employees who left before agreement was reached and were therefore no longer part of the bargaining unit.

show that in September 1975, Hastings Foster, as the secretary of Respondent's Investment Committee, which is composed of five members of the Board of Directors, notified several insurance companies that the committee was "considering asking our Trustee" to invest the assets in a guaranteed-amount-fixed-income arrangement, and invited proposals.

On January 15, 1976, the board of directors approved such a transfer of fund assets. On January 22, Foster wrote Morgan Guaranty that the "Investment Committee of our Board of Directors has determined that the assets currently held in the Trust . . . should be liquidated and invested by the Trustee in an insurance contract . . .," and also stated that "[w]e have negotiated a contract with the Equitable Life Assurance Society" to that end, and "[w]hen the formal contract is issued it is planned that the same will be issued to you as Trustee and you will hold it as in effect the sole asset of the Trust." By February 2, $17 million of the $19 million being held in trust had already been transferred to Equitable, under an arrangement by which Equitable guaranteed the principal for a 10 year period and provided a 9.15 percent rate of return. The Union received no word of this transfer until April, when all of Respondent's employees were informed.

The complaint, as described, alleges that Respondent "unilaterally changed" its profit-sharing plan by virtue of the transfer, "thereby unilaterally eliminating its supplement to said plan." The foregoing language indicates that the transfer itself, as well as its asserted effect on the floor, constituted unlawful unilateral action, and Respondent so interprets the allegation, arguing at some length that the transfer to Equitable was not a mandatory subject of bargaining. In essence, Respondent contends that the terms of the existing plan placed no limitations on the

manner in which funds could be invested, a fact as to which the Union was reasonably put on notice by receipt of a copy of the plan in March 1975, and that the decision to purchase the Equitable contract was simply an exercise of the discretion already existing under the plan.

Respondent argues that the plan "charged the Trustee with the responsibility of providing 'for the investment of the Fund and the payment of the benefits of the plan.' "[32] As also noted by Respondent, the plan provides that "the Company shall have no liability for the payment of benefits under the Plan nor for the administration of the funds paid over to the Trustee."

Although Respondent disingenuously notified the Union in April that "the trustee of that plan has been able to make" the Equitable investment, there is no question that the decision was initiated, developed, and completed by Respondent, and Respondent's brief plainly acknowledges that it was the actor here. In consummating that change, the evidence shows, it became necessary to amend the trust agreement. While the trust agreement is not in the record, we have a letter to Respondent from Morgan Guaranty enclosing amendatory language "which may be added to Article II, Section 2 of our Trust Agreement to authorize Morgan Guaranty to transfer the Trust assets to an insurance company for the purchase of policies or contracts." A "Supplemental Agreement" entered into between Respondent and Morgan Guaranty witnessed that it was necessary to "amend the Trust to provide for and permit the Trustee to acquire and hold certain contracts

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32. The plan provides, in pertinent part: "All the funds of the plan shall be held by a Trustee or Trustees appointed from time to time by the Board of Directors, in trust under a trust instrument or instruments adopted, or as amended, by the Board of Directors to segregate the Fund from the funds of the Company, and provide for the investment of the Fund and the payment of the benefits of the Plan. . . ."

in the nature of insurance contracts. . . ." The amendment, of which we have a copy, added a paragraph to the trust agreement; the amendment provides, in part:

> The Trustee shall apply the assets of the Trust Fund to the payment of premiums upon, or considerations for, policies or contracts issued by insurance companies if and only to the extent directed by the Investment Committee. . . . The Trustee shall have no duty to inquire into the terms and provisions of any application or other documents executed by it upon the direction of the Investment Committee or of any policy or contract acquired by or delivered by it. The Company shall indemnify and hold harmless the Trustee of and from any costs [etc.] in respect of the acts [etc.] which the Trustee performs or undertakes upon the direction of the Investment Committee.

A letter agreement sent by Morgan Guaranty to Equitable, signed by both, and accepted by Respondent, states that while Morgan would be the contract-holder of the group annuity contract to be issued by Equitable, "it is the intent of J.P. Stevens & Co., Inc., that the Investment Committee under the Plan perform all the functions normally required of the Trustee as contract-holder except the signing of documents modifying the terms of such contracts," and includes a provision that Equitable "will deal with the Investment Committee under the Plan in all instances in which such contract calls for dealing with the Trustee."

Accordingly, since, as Respondent contends, the plan "charged the Trustee with the responsibility of providing 'for the investment of the Fund' . . .," Respondent's decision to make the Equitable contract "the sole asset of the Trust," and to absolve the trustee of any duty to "inquire into the terms of . . . any policy or contract acquired

by . . . it," necessarily eliminated any investment discretion—and responsibility—theretofore vested in the Trustee with respect to such assets held in trust. Further, the provisions of the letter agreement making the Committee responsible for "perform[ing] all the functions normally required of the Trustee" and requiring Equitable to "deal with the Investment Committee under the Plan in all instances" instead of with the trustee, also effectively placed in the Investment Committee the authority contemplated by the plan to reside in a trustee. This clearly constituted a change in the plan, which not only contemplates that a trustee shall provide for "the investment of the Fund," but also removes the Company from any role in the "administration of the funds paid over to the Trustee."

Such changes appear to be of sufficient significance as to require bargaining. In *The Connecticut Light & Power Company*, 196 NLRB 967, reversed 476 F. 2d 1079 (C.A. 2), the Board held that the selection of an insurance carrier, where the union was dissatisfied with the present one, was a mandatory subject of bargaining, even though the union was not seeking any specific changes in the benefit levels and other features of coverage. See also the Board's Supplemental Decision in *Bastian-Blessing*, 195 NLRB 1108, enfd. 474 F. 2d 49 (C.A. 6), where the Board held that an employer's termination of its policy with Aetna Life Insurance Company was bargainable because it "involved a substantive loss at least in terms of Aetna's administration and funding."

Here, the change permitted the trustee to assume a function not previously permitted by the trust agreement, and it may well be that the Union would have wished to explore the wisdom of such a modification. It further transferred the performance of fiduciary obligations to the

Investment Committee, without any express acceptance by the Committee of a trust; that appears to contravene the terms of the plan, and the Union might have wanted to speak to that as well. In the circumstances, I conclude that the unilateral transfer of the funds to Equitable, in the accompanying circumstances, violated Respondent's duty to consult the Union about changes relating to mandatory subjects of bargaining.[33]

I do not see, on the other hand, how the transfer of the funds resulted in "unilaterally eliminating [Respondent's] supplement" to the plan, as alleged. The floor was simply a commitment by Respondent, based on its general assets, to guarantee that distributions to employees from the plan would not be less than the amounts credited to their individual accounts during the period 1964-1975. The evidence shows that at the time of the transfer, there was a surplus in the Fund. While the transfer of assets to Equitable may have made the floor unnecessary, since the return of principal was guaranteed, it is also conceivable that Equitable might have suffered financial setbacks which would have given renewed vitality to the floor; and, at any rate, the Equitable contract had only a 10 year duration, after which the floor might have served a useful purpose.

Little testified that the floor continued to exist. Respondent's general counsel stated in a July 7, 1976, affidavit in a civil action, discussing the transfer to Equitable, that "the participants are assured that the amount of their accounts will not only not decrease below the floor guaranteed by the Company but will more than dou-

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33. I recognize that this conclusion extends beyond the apparent thrust of the complaint, which alleges a violation "by authorizing the investment of its assets at a fixed rate of interest." In this instance, however, Respondent was sufficiently on notice of the area of charged violation, and I do not think that the matter could have been more fully litigated.

ble over the next 10 years;" the clear implication is that the floor was still in effect. The fact that the conversion of the funds into an insurance contract may have pretermitted the possibility of market gains, a fact noted by Charging Party, is an argument which bears no relevance to the claim of unilateral elimination of the floor.

Consequently, I recommend dismissal of the allegation insofar as it asserts an unlawful elimination of the profit-sharing supplement.

D. *The 1975 Wage Increase*

The amended complaint alleges, as an independent violation of Section 8(a)(5), that:

> Respondent, notwithstanding its previous insistence as late as August 13, 1975, that its wages were competitive and that there was no need for a wage increase, informed the Union on August 14, 1975, that it was announcing that day an undetermined wage increase for its unrepresented employees to be effective September 8, 1975, and, in bad faith, offered the Union a "choice" of rejecting that increase or acquiescing in the announcement of the increase for the represented employees at Roanoke Rapids without offering the Union any proposal as to the amount of such increase.

The next major benefit improvement falling into the "Hobson's choice" category occurred some 7 months after the institution of the profit-sharing floor.

On June 13, 1975, the Union made a written proposal calling for an immediate wage increase of 12 percent for all employees, without prejudice to further bargaining on its formal proposal already on the table. Little responded by saying that Respondent was continuously surveying the textile industry and was satisfied that the current wage scale was fair and competitive.

On August 13, Hoyman raised the subject again, pointing out that, in recent weeks, two other textile manufacturers had announced general wage increases. Little stated that Respondent was aware of these developments, but "the company felt that the Stevens wages were still competitive, and that they reviewed these matters and that they saw no need to agree to any wage proposal."

The evidence shows that wage movement in the generally unorganized Southern textile industry has followed a historical procedural pattern: every so often, one or more companies will announce a wage increase, unspecified in amount, to be instituted several weeks later. Thereafter, other companies follow suit, and the increases adopted usually fall within a narrow range. In 1975, while Cannon Mills, West Point Pepperell, and several other companies made announcements of such increases some weeks prior to August 13, the record shows that four large manufacturers, Burlington Industries, Deering Milliken, Spring Mills, and Cone Mills, all publicly announced undetermined general increases on August 13, to take effect in September.

On August 14, at a bargaining session, Little announced that the Respondent was that day posting notices in its nonunion plants announcing an unspecified wage increase to take effect on September 8. After some acrimonious comment by Hoyman about the awkward position in which the Union was placed by such a move, the parties agreed to post a similar announcement at the Roanoke Rapids plants, hedged by a proviso that the increase would be effective only if agreement could be reached as to the amounts of the increase.

Hoyman questioned Little about his sudden *volte face*, and Little, noting the pattern which had developed the previous day, said he had learned of the Company's change of position by a telephone call on the preceding evening.

He said that only the top officers of the Company had authority to advance wages, and Hoyman deplored Little's limited bargaining powers. Hoyman asked that the Union be notified as quickly as possible about the specific increases Respondent intended to propose.

Two weeks later, on August 28, Respondent gave the Union a list of proposed new rates for all classifications in all seven plants. The Company advised that the increase amounted to an average of 7 percent, with small variations. After the Union unsuccessfully argued for some adjustments in various classifications and in the overall increase,[34] the Union, conscious of the lead time required to institute the changes (to take effect September 8) and of the upcoming Labor Day holiday, agreed to the proposed wage scales.

Little testified that he first heard of the increase when he received a telephone call from Jelks, his superior, on the evening of August 13, telling him that the Company had made a determination on "that day" to announce an increase on August 14. He further testified that his pre-August 14 representations as to Respondent's attitude toward the necessity for an increase were based on an inference he drew from the fact that he had heard nothing to the contrary from higher officials.

A subpoena issued by General Counsel resulted in the production of the following undated and unsigned memorandum from the files of Jelks:

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34. Hoyman pointed out that other textile companies with which the Union was bargaining had made offers which, including fringe benefits, amounted to 7.4-7.6 percent increases.

TARGET DATES

1. As near as possible to 10:00 A.M. on Thursday, August 14th, post notices in all plants, other than Roanoke Rapids and Statesboro, reading as shown on attached.

2. At beginning of bargaining meeting at Roanoke Rapids on Thursday, August 14th, convey the same information to the Union representatives there at that meeting.

3. Also tell the Union representatives at the Roanoke Rapids bargaining meeting on Thursday, August 14th that amounts of increases have not yet been decided upon by the company—that as soon as these amounts are arrived at by the company, the Union representatives will be called by telephone and another meeting then arranged with them (it is expected that this call to the Union representatives will take place on or about August 21st, offering to meet at the Union's convenience any day during the following week).

4. When meeting does take place with Union representatives, during the week of August 24th, company representatives should be ready to make a proposal to the Union whill (sic) will state the general areas of the increase which the company is offering, for example seven percent (7%).

5. On or about September 4th, supervisors in all plants other than Roanoke Rapids and Statesboro will inform individual employees of their new rates—except that at selected plants, for example Wallace, N. C.—Delta Nos. 2 and 3 and Walterboro—individual informing of rates by supervisors can hopefully be done earlier than September 4th—perhaps on about August 28th.

Little testified only briefly about the document, saying he had just seen it in the few days before his testimony and did not know who wrote it. Jelks, who might have been more illuminating, did not testify.

The memorandum is of interest. It evidently emanated from the highest echelon of Respondent, applying as it does to "all plants, other than Roanoke Rapids and Statesboro."[35] The fact that headquarters would lay down such specific guidelines for bargaining about the increase at Roanoke Rapids indicates that the local negotiators were viewed as possessed of virtually no real authority.

The probability that the notice must have issued well in advance of 10 a.m. of August 14, the time at which the prescribed ("attached") notices were supposed to be prepared and posted, strongly suggests that Little in fact was fully aware of the intention to announce the increase prior to the evening of August 13, when he says he first learned of the matter by telephone. It seems obvious that the large textile companies were closely working together on this matter; I would not assign to fate the fact that Burlington, Deering Milliken, Spring and Cone all publicly announced increases on August 13. Respondent very likely was represented at the conferences which led to those announcements.[36] If that assumption is correct, Little simply misrepresented the fact, wittingly or not, when he told the Union that the increases had been decided in New York on August 13.

The very deliberateness of the memo—the call to the Union arranging a meeting was to be made "on or about August 21st," the meeting was to occur "during the week

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35. "Statesboro" refers to a plant in Georgia, the only other of Respondent's plants represented by a union—this same union—at the time.

36. Why Respondent itself held back on a public announcement is subject to more than one explanation. See p. 44, *infra*.

of August 24th"—is revealing. Respondent's thus-disclosed commitment to a predetermined timetable evidenced a lack of concern with the more important consideration of getting the proposal to the Union as soon as possible. When Respondent finally, on August 28, presented a detailed proposal covering increases for hundreds of clasifications, with pointed reference to the lead time required for putting them into effect by September 8, as complicated by the Labor Day holiday, the Union, after making a few passing efforts at amending the proposal, predictably capitulated before the steamroller effect. In my view, it is highly questionable whether Respondent harbored any serious bargaining intent in this instance.

E. *The 1976 Wage Increase*

The amended complaint alleges a violation of Section 8(a)(5) in that:

> Respondent, notwithstanding its summary rejection of, and its failure to make a counterproposal to, the Union's proposal of April 13, 1976, for a 15 percent wage increase, informed the Union on April 28 [sic] 1976, that it was announcing that day, at its nonunion plants, another unspecified wage increase effective June 21, 1976, and, in bad faith, offered the Union the "choice" of rejecting the wage increase for the represented employees at Roanoke Rapids or acquiescing in the announcement of such increase for those employees.

The factual setting here is similar to that involved in, and occurred some 8 months after, the 1975 wage increase. On April 13, 1976, the Union proposed an immediate 15 percent wage increase. Little stated that the Company believed its wages to be competitive and that it saw no industry wage movement. Hoyman referred to the 1975 sequences of events, terming it "bad faith" on the Com-

pany's part, and asked that it not happen again. According to Little, he told Hoyman "we would consider the Union's proposal."

On April 26, the Company told Bush, and wrote Hoyman, that it was that day announcing to all plant employees outside of Roanoke Rapids an unspecified wage increase to take effect on June 21. The letter stated that unless the Union desired otherwise, Respondent would refrain from making an announcement to the Union-represented employees, and further said that the Company was prepared to discuss all aspects of the proposed raise at a bargaining meeting scheduled for May 6. The letter emphasized that the decision to institute a wage increase "was made by our Company's management today and that your Union was thereupon informed of this decision as soon as it was made." Unlike the 1975 increase, therefore, the 1976 announcement was made to non-organized employees before the Union was afforded any opportunity to participate in a simultaneous announcement at Roanoke Rapids.[37]

At the May 6 session, Little proposed that an increase be given in line with the pattern then developing in the industry. The parties agreed to issue a notice similar to that posted in 1975. At the May 13 meeting, the Union called for a specific delineation of proposed increases, but the Company had none. The Union urged haste. At the bargaining meeting of June 7, 14 days prior to the effective date of the announced conditional increase, the Company, as in 1975, presented the Union with a list of classification-by-classification proposed increases for employees in each mill. The Company described the overall proposal as an approximate 10 percent average increase, with a gen-

37. It is obvious that Bush was not authorized to agree to such an announcement.

eral range of 7 to 17 percent. The Union asked about the basis for the substantial variations, and the Company described three guidelines employed. The Union, having difficulty comparing the seven separate plant proposals, sought some information which might permit an integrated comparison of the seven plants, and the Company gave a lengthy oral description of all classifications, their wage levels, and the percentage increase proposed for each classification. Finally, after a caucus, the Union proposed that no employee be given no less a 10 percent increase. The Company agreed to consider the proposal.

On June 10, the parties again argued about the variances and the Union-proposed 10 percent floor. Hoyman inquired as to whether the variances being put into effect at the nonunion plants were as large as at Roanoke Rapids; Little said he had ascertained that there were variances at the other plants, but knew no details. The Union made a specific proposal as to two job classifications which were to receive unequal pay, saying they should be equalized, and as to some classifications which were filled by only a few people. It also requested information as to the specific percentage adjustments made in the 1974 general wage increase. The Company supplied this information the next day.

On June 7 and 11, the Union asked how the differentials had been determined, and was told that there were no written memoranda or evaluations, but rather that plant officials familiar with the jobs had been consulted and the adjustments based, in Little's words, on their "collective judgments." Respondent also denied that the rate of increases was based on any guidelines received from outside Roanoke Rapids.

Thereafter, on June 15, pursuant to an earlier request, the Company supplied a chart listing overall variances at

12 unidentified plants, said to be similar to the Roanoke Rapids plants. On June 16, the Union asked that the plants at least be identified by the nature of their process, but the Company would not do so. Respondent did, however, accede to the Union's request for a breakdown of the number of job classifications represented at the listed plants. Once again, the Union raised the question of the formulation of the variations and the 10 percent minimum proposal. When the Respondent rejected the latter proposal, the Union, indicating dissatisfaction but recognizing the imminence of the June 21 effective date, agreed to the installation of the proposed rates.

Respondent introduced, without objection, a newspaper article dated April 28 which states that, on April 27, Burlington Industries, the nation's largest textile manufacturer, had announced a 10 percent pay increase.[38] The article also states that, in the preceding week, Cannon Mills and Textiles, Inc., had announced increases. The article further says that Burlington was following the lead of "Cannon Mills and J.P. Stevens Co.," and that Respondent, "the second largest textile company, announced Monday [April 26] it would increase the wages of its hourly paid employees June 21." It thus appears that in 1976, Respondent was given the opportunity of being one of the major manufacturers to take the lead in announcing wage increases.

Among the materials subpoenaed by the General Counsel is a May 7, 1976, intra-Company memorandum from F.J. Parks, Jr., to 11 vice presidents of manufacturing in five states, including J.M. Beck in Roanoke Rapids, with a copy to Jelks. It begins:

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38. The testimony indicates that it was unusual for Burlington to have included the amount of the increase in its initial announcement.

> The following guidelines have been approved for implementation of the wage adjustment effective June 21, 1976, for all manufacturing divisions except Hosiery.
>
> Production hourly employee rates may be increased to average 10 percent.

General Counsel argues that this memorandum belies Respondent's representation to the Union that there were no written "guidelines" on which it based its proposal. However, the Union had apparently been requesting guidelines which would explain the variations between classifications, and this document does not attempt to lay down any such controlling principles. It does seem improbable that the changes made in several hundred classifications were, as Respondent stated, accomplished by informal consultation with knowledgeable officials, but no documents establishing the contrary were produced.

What the memorandum does show, however, is that all the plants were given a uniform fiat: "hourly employee rates may be increased to average 10 percent." This mandate conceivably left room for juggling within the 10 percent figure, but made it impossible for Roanoke Rapids management to seriously consider the Union's 10 percent minimum raise proposal without abandoning management's obvious interest in maintaining variant increases.[39] Little said at the hearing that, as a general matter, his bargaining committee would have to seek approval from the highest levels to change important monetary policies. While he told the Union that its proposal would be considered, there is no evidence that he conveyed it to the top. The finality

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39. Little testified that he "believes" the actual average increase for bargaining unit employees was "probably around 10.3 or 10.6, I'm not sure which." That sort of testimony, when unimpeachable documentation is available, is plainly both unreliable and suspect.

with which the May 7 memorandum resounds makes clear that no margin for bargaining was to be permitted.[40]

An early demonstration of Respondent's negligent attitude toward the Union occurred when, on April 13, the Union had proposed a 15 percent increase, and Little represented that Respondent believed its wages to be competitive but said the Company "would consider the Union's proposal." Little admitted that he based the former assertion only on the fact that he had heard nothing to the contrary from higher up. As to the agreement to "consider" the proposal, Little conceded that any such decisions would have to be made by top management; there is no evidence that the proposal was conveyed upward, and I have no doubt that it was not.

Further evidence of Respondent's indifference to the Union's responsibility for bargaining on behalf of 3000 employees appears in the unexplained delay in making the specifics of the 1976 proposal available to the Union. The announcement was made on April 26. The May 7 memorandum established that the increases had to average no more than 10 percent. A month then passed before the specific proposed increases were given to the Union on June 7, two weeks before the increases were to take effect. This should be compared to 1975, when Respondent prepared a similar proposal in just two weeks (but again

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40. That Respondent had Roanoke Rapids clearly in mind at the time of issuance of the memorandum is shown by a handwritten draft of it, which is in evidence. Deleted from the final copy is the sentence "Rate adjustments based upon the above guidelines should be equal to or greater than comparable Roanoke Rapids rates where it is practical." The deleted sentence is interesting, showing, as it does, a concern that employees at the non-union plants should not fare any worse from the wage adjustments than comparable Roanoke Rapids employees. A similar concern was evinced in what appear to be notes of a high-level meeting on August 28, 1975, regarding the 1975 raise; those notes say, *inter alia*, "No jobs lower than comparable jobs in Roanoke Rapids—Fabricating plants only."

only 11 days before the announced effective date). It seems clear that Respondent was impelled by no sense of urgency or recognition of the needs of the Union; it appears, rather, that the Company was content to expand the time for making the proposal in accordance with the time available to it, so long as a presentation could be made to the Union at what could be considered a "reasonable" time before the effective date.

That the bargaining at Roanoke Rapids was not to be taken seriously is indicated by a subpoenaed memorandum of June 8, 1976, from F. J. Parks to 11 vice presidents of manufacturing, with copies to Harrell and Jelks, stating that the "reimbursement rates to become effective June 21, 1976 have been approved as follows," and then showing $2.65 per hour for the fabricating plants, including "Roanoke Rapids," and $2.85 for "all other locations." Hoyman testified that nothing was ever said to him about the subject of reimbursement rates.

While the record indicates that Respondent was ready to talk about the wages proposal, and to supply information requested by the Union, its blanket refusal to vary any of its hundreds of proposed increases, even to meet Hoyman's request to conform "a copule of specific job classifications that were only a small distance apart but that we thought that they should be equal," displayed a rigidity which seems in keeping with each and every decision made over the 2 year period covered by this record.

F. *The 1976 Group Insurance Program*

Two months later, another company-wide benefit improvement was announced. The amended complaint alleges that Respondent violated Section 8(a)(5) as follows:

> Respondent, notwithstanding its failure to comply with the Union's requests of August 6, 1976, of September 2,

1976, and subsequent requests, for information as to its existing group insurance program, notified the Union on September 2, 1976, that it had decided to announce unspecified benefits in its group insurance program at its nonunion plants and in bad faith offered the Union the "choice" of rejecting those benefits for its represented employees or acquiescing in an announcement of the benefits at Roanoke Rapids.

As of August 1976, both parties had made proposals on the subject of insurance, the Respondent offering to maintain the existing coverage of its group insurance program. On August 6, the Union, by letter, requested four categories of documents from Respondent relating to the insurance program. At a bargaining meeting on August 12, Respondent told the Union that the request had been put into the hands of Respondent's insurance department.

As of September 2, none of the requested information had been received. On that day, Little announced to the Union that Respondent had decided to institute an improved group insurance program and an additional paid holiday, that these two items were being announced that day in the unorganized plants, and that he would appreciate the Union's position on these matters at Roanoke Rapids. Asked about the details of the program, Little said he had none. Hoyman rejected Little's offer to make the same announcement at Roanoke Rapids, on the ground that he could not agree to a complex program about which he was uninformed. Hoyman also asked about the documents requested by the August 6 letter.

At a September 15 meeting, Little was still unable to supply particulars about the new program, which was assertedly still in flux, and, when asked, said that Respondent was still compiling the documents earlier requested. Hoyman stated that he would be glad to receive the ma-

terial piecemeal, and urged Little to seek out a useful contact in Respondent's insurance department. In probing about the new program, Hoyman stated that the Union would appreciate information about the areas being developed, so that the Union "could put some input into it." On September 16, Hoyman again sought details about the new program, but got none. He also again requested the August 6 information.

By letter of September 17, Respondent satisfied three of the four categories of information sought on August 6.[41] The fourth item requested was the existing insurance agreement between the Company and its carrier, Provident Life and Accident Insurance Company. The September 17 letter stated, "The only written agreement we had is no longer current or applicable. A current agreement is being prepared and as soon as this is complete, a copy will be forwarded to you."

On September 29, Respondent presented the Union with a document called "Principal Features Proposed For Group Insurance Improvements," which briefly outlined the new insurance program, described by Hoyman as constituting a "very major change" in the nature of the coverage. Respondent also orally gave the Union information as to estimated company and employee premium costs. In the course of a lengthy discussion, Hoyman again asked for the existing insurance contract and, as well, as many pieces of the new contract as might be presently available. He also requested several other kinds of data. Toward the end of the meeting, Little said that the outline of the new program was also being distributed to employees at non-union plants that day, and that the employees were being informed of an effective date of December 1.

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41. Little testified that Respondent had been waiting to furnish all the material at once, until Hoyman indicated on September 15 that the Union would accept it in installments.

At an October 19 meeting, the Union was given some requested information. Hoyman again asked for the existing insurance contract and again was told that no formal contract existed. Hoyman chastised Respondent for the "terry cloth curtain" it had pulled down over the new program, noting that the Union had received only the bare consumer details given to lay employees, while the Union needed technical and financial information.[42] Since Little professed ignorance, Hoyman asserted the responsibility of the Company to call into the bargaining conference more informed officials.

On October 20 Respondent produced no further information. A discussion ensued about the need to educate employees about the nature of the program, which involved several optional features. Recognizing the time required for indoctrination and reenrollment prior to December 1, Hoyman testified that he felt compelled to agree to the installation of the program.

By two letters of October 27, Respondent sent the Union (1) listings of covered hospital and medical expenses and a surgical costs schedule pertaining to the new program, and (2) with the indication that "the formal agreement [covering the existing program] which is still in course of preparation is still not complete," a copy of a letter agreement from Provident, dated April 14, 1976, setting out a premium adjustment policy, a list of premiums in effect as of November 1, 1975, and an employee certificate of insurance, showing prevailing coverage. A document subpoenaed by General Counsel shows that a copy of the Provident letter agreement had been sent by Re-

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42. Company notes read: "Hoyman stated that the Company gave the Union specific coverages—life with the cost of what each cost. Hoyman stated that he calls this consumer information. Hoyman stated that the Union wants seller and buyer information."

spondent's insurance department to Roanoke Rapids on September 16; that same communication also enclosed a representative premium statement which was never presented to the Union, but rather only selective information from the statement was extracted and mailed to the Union on October 27. Hoyman testified that, at some uncertain time, he had asked for evidence of the business relationship between Provident and Respondent, in the absence of a formal document. The letter agreement and the premium statement were sent from New York to the Roanoke Rapids company negotiators on September 16, pursuant to a "telephone conversation," "for your use with the Union." Why the negotiators held back this data until October 27 is unexplained.

On December 2, the day after the new program took effect, Respondent mailed the Union a copy of the just-expired formal agreement which, the cover letter notes, "was recently completed and received by us." An exhibit shows that the policy was mailed to Roanoke Rapids from New York on November 17. On its first page, the policy states that it was executed by Provident on "September 23, 1976."

Documents subpoenaed by General Counsel show that in May 1976, Respondent's insurance department had prepared and issued a lengthy analysis of a proposed overhaul of the existing insurance programs, an analysis authorized in February 1976. Respondent's Industrial Relations Committee, including Jelks and Little, discussed the new program at a July 13 meeting. Detailed analyses appear thereafter, and by August 31, A. R. Treadwell, Respondent's Insurance Manager, had already awarded a contract, at around $30,000, to an insurance consultant for a "communications project" which would prepare supervisors and employees for the revised program. In a memo-

randum on that date, Treadwell noted that the consultant would require 3 months to "create the needed package of communications material," and set out a detailed schedule for introduction of the program, including the designation of November 23- December 1 as the dates for "meeting leader training sessions," December 1-7 for "[e]mployee audio visual presentations," and December 6-31 for "the enrollment process."[43] The initial audio-visual slide script draft was to be delivered to Respondent by September 17. By September 2, the consultant had already prepared a second draft of a letter setting out the "highlights" of the new program; it was sent to Jelks on that date. On or about September 29, the day on which the Union received the "Principal Features" document, a handout, describing the major features of the program, was distributed to employees at the unorganized plants.

General Counsel primarily focused at the hearing on two aspects of the Respondent's treatment of the Union *vis-a-vis* this benefit improvement. The first relates to Respondent's parceling out of information to the Union regarding the new program.

The issue again arises of whether Respondent dealt in bad faith with the Union by unnecessarily concealing information. The subpoenaed documents do not establish definitively when Respondent finally and comprehensively decided upon the terms of the program. Little testified that he was "reasonably certain" that the final feature—the amount of free life insurance—was not decided upon until September 23. Presumably Respondent could have presented more authoritative evidence on this issue; it did not. The assertion seems belied by the fact that, on September 29, only 6 days after September 23, Respondent handed out to all unorganized employees a glossy,

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43. This schedule was subsequently accelerated by 1 month.

multicolored pamphlet describing all major benefits of the new program, including the amount of free life insurance.

Whatever the facts as to the final determination regarding the life insurance, however, it certainly seems clear that the other features of the program, including the comprehensive medical plan, had been settled on substantially before September 2, when the first brief notice was given to the Union and, simultaneously, to the non-union employees. Little was quite aware, when the parties discussed on August 6, 12, and 13 the Union's request of the former date for insurance information, that a new program was on the way. It would appear that since the Union was obviously engaging in an effort to study the existing program, a measure of good faith should have led Little to at least suggest that the Union suspend such an investment of energy due to the Company's contemplation of a major overhaul of the insurance program. Little, instead, sat there and discussed the requested information without any indication of the effort then underway to revise the benefits.

Respondent's insistence on according the Union parity of treatment with the unorganized employees was adhered to in this instance. The subpoenaed documents show that many major decisions had already been made by September 2.[44] Yet, on September 2, the Union was given only

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44. A letter of July 29 from Respondent to its insurance consultant contains a detailed analysis of "Monthly Premium Rates For Proposed Comprehensive Plan." On July 30, Stevens sent to its consultant the group insurance budget assumptions for fiscal 1977, noting for inclusion in the "Budget Assumption for Fiscal Year 1977" an announcement of an "increase in company cost of 40%" to "accommodate Group Insurance developments anticipated for Fiscal Year 1977." Attached was a worksheet showing, under the heading "Cost of Plan Improvements—effective 11/1/76 or 12/1/76," a money figure relating to "Items reviewed with J.D. Finley/Whitney Stevens." The requests to insurance consultants for bids on the "communication project" went out on August 19. The implementation schedule was outlined in the memorandum of August 31, and a second draft of a "highlights" announcement had been prepared by September 2.

the same unspecific announcement that the non-union employees received that day. Even accepting Little's less-than-certain testimony that the program could not be considered totally settled until September 23, it seems undeniable that virtually all major features of the plan were in place before then. Nonetheless, it was only on September 29 that the Union received a brief description of the highlights of the plan, which was simply a paraphrase of the printed handout given to the employees that day. Why the Union could not at least have been notified of the details of the plan on September 23, when the life insurance amount was purportedly determined, is not disclosed by the record.

Even if it be assumed that an employer is not required to inform a union of a proposal until it is finally developed, it nonetheless seems evident in the circumstances—the proposal of a major and complex change in insurance benefits—that Respondent's insistence on such a right, to the point of refusing to volunteer information which it assuredly knew would not change, betrayed a lack of concern with the Union's need to have basic information as soon as it was available. "While GE may have believed that it was acting within its 'rights' in offering a take-it-or-leave-it [insurance improvement] proposal, doing so may still be some evidence of lack of good faith . . . GE's attitude on information was characterized by a petti-fogging insistence on doing not one whit more than the law absolutely required." *N.L.R.B. v. General Electric Company, supra,* 418 F. 2d at 757. The perpetuation here of the pattern of feeding the Union only so much information as the non-union employees were receiving suggests a form of game-playing antithetical to the notion of good faith.

I doubt, however, that such an inference may be drawn from Respondent's failure to furnish the Union a copy

of the existing specimen policy between Respondent and Provident. As unlikely as it may seem, the evidence shows that although Provident drew up such a policy in 1971, the parties never executed it and never kept it up to date. Revisions in the 1971 agreement were made by understandings reached between the carrier and Respondent. In 1976, there were a number of items in the 1971 policy which obviously did not apply; there were oral agreements which had since been reached; and there was a general lack of certainty as to what the nature of the insurance contract was. It developed that only a handful of changes had to be made in the 1971 specimen policy to make it current, but that could not be known until Respondent and Provident had worked together to agree upon the terms of their obligations to each other. It is true that Respondent could have given the Union a copy of the unexecuted 1971 specimen policy with the warning that it was incorrect; that would have been of no assistance to the Union. It seems to me that Respondent's negotiators acted sensibly in accepting the advice of its insurance department that the old specimen policy did not reflect the current agreement and should not be supplied to the Union.

Respondent's treatment of other data is not so defensible. As noted, a letter agreement sent to Roanoke Rapids by Respondent's insurance department on September 16 was not furnished to the Union until October 27. Similarly, a representative premium statement also sent to Roanoke Rapids on September 16 was not sent to the Union until October 27, and then only in truncated form. No explanation was offered for this delay. A like delay attended the receipt by the Union of the newly-composed "old" insurance agreement. Although it was mailed to Roanoke Rapids on November 17, it was not supplied to the Union until December 2, the day after the new pro-

gram became effective. Akers attributed the delay to having "checked [the policy] out against the information that we had already given to the Union to see if it indeed was correct . . . we reviewed this policy to see if we could find out anything about whether it was correct or there were any errors in it." Why the Roanoke Rapids negotiators thought themselves in a position to detect errors in the newly-executed policy sent from New York is unexplained.

Here again, the steamroller effect on the represented employees may be seen. The Company quietly prepared a major new program. It parsimoniously released information to the Union on September 2 and 29, and only so much as it simultaneously made available to rank-and-file employees at unrepresented plants. As the effective date drew on, the Union, recognizing the time constraints, agreed to the program, and only thereafter received relevant information which Respondent had in its possession 6 weeks before it was dispatched. Given Respondent's conduct and the intricate character of the program (fully developed at least by September 23 and intended to go into operation by December 1), it seems quite unlikely that Respondent was ever sincerely inclined to bargain about this benefit improvement at Roanoke Rapids.

I take note of the fact that on October 20, even before it agreed to the program, the Union had already prepared leaflets for distribution to employees hailing a victory at the bargaining table. I do not doubt that the Union's previous experience led it to assume that there would be no real bargaining. I further note that in this case, as in prior instances, the Union's leaflets announcing the benefit increases proclaimed the improvements as glowing examples of the Union's bargaining prowess. These misrepresentations—and one thing the Union surely knew

was that the benefits had not in fact been won by skillful negotiating—are not to be condoned.

In a larger sense, however, I think that the Union was not far off the mark in attributing the improvements to its own efforts (in organizing, however, and not in bargaining). A study made by Respondent's insurance department in May 1976 contains the following: "The move to provide employees with their coverage without requiring a contribution is virtually complete within the textile industry. In this aspect, the group insurance program provided by Stevens is not competitive and is *very vulnerable to employee relations problems*" (emphasis added). This euphemistic reference suggests Respondent's sensitivity to the Union's ongoing campaign at its mills, and further suggests that many benefits may indeed have flowed simply from the Union's persistent presence.

G. *The 1976 Pension Plan*

Another series of events which all parties treat as falling within this general category, although not the subject of a separate allegation, involves Respondent's establishment of a pension plan in 1976.

Early in the negotiations, the Union had proposed the creation of a pension plan; the hourly employees then had no such program. On April 1, 1976, Respondent made an audio-visual presentation, complete with slides, to its employees at all plants. The presentation focused on four items: the annual report on the profit-sharing plan for the past year; an announcement that "the Company" had made the profit-sharing fund arrangement with Equitable; a description of amendments to the plan made pursuant to the Employee Retirement Income Security Act ("ERISA"); and an announcement that the Company had decided to put into effect a pension plan for hourly em-

ployees. The slides and narrative pertaining to the latter subject were deleted from the presentation at Roanoke Rapids.

Also on April 1, Bush was informed at a grievance meeting of the intention to establish a pension plan. The notification was given in accordance with a document, supplied pursuant to a subpoena, entitled "Initial Contacts With Union on Pension Plan and on Change in Profit-Sharing Plan." The document begins, "On April 1, in one of the frequent daily grievance meetings, the following statement will be made to the Union." It then goes on to set out a four-paragraph statement which announces the intention to create a pension plan, asserts that there are not as yet "specific provisions to offer on this," and declares a readiness to present the provisions when they become available and to "enter into such discussions and negotiations on the subject as you may wish." The scenario then provides that later that same day, a letter, containing essentially the same material as in the oral notification, would be hand-delivered to Bush or Jones in Roanoke Rapids, with a copy to Hoyman in Charlotte. The text of the letter is set out. None of Respondent's witnesses recall seeing or being aware of this script, which was subpoenaed from Jelks' files.[45]

At the next bargaining session, on April 13, the Union sought details of the pension plan, and Little said they were being developed and would be later furnished. At this meeting, the Union orally increased the amounts of pension entitlement contained in its own proposal. On April 22, Respondent mailed the Union a 2½ page document

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45. The announcement to the Union also makes fleeting reference to the transfer of profit-sharing assets to Equitable, but is less specific than the presentation made to the employees on that same day, since no mention was made to the Union of the amount of assets transferred or the interest rate secured.

entitled "Principal Proposed Terms for Pension Plan," with a letter denoting the document as an "outline of principal terms" which were being proposed, and offering to "continue our bargaining with you on this matter at any mutually convenient time." Essentially the same material was, at the same time, distributed to all the unorganized employees at the other plants.

At the May 6 negotiations, the pension plan, and its interrelationship with the changes in the profit-sharing plan, was discussed. The Union requested more detail than was contained in 2½ pages; Respondent said the details would be supplied later.

On May 11, Respondent hand-delivered to Hoyman's office a fully-developed, 35 page pension plan, entitled "Proposed Terms," and indicated a desire to discuss the plan at the next meeting on May 13. At that meeting, Hoyman stated that he had received the plan at another bargaining location the preceding day, but had not had an opportunity to read it. The plan was nonetheless discussed.

At this meeting, the Union informed Respondent that it did not think it could be ready to bargain about the pension plan for about 3 weeks.[46] The Union's position provoked a strong reaction from Respondent—a letter on May 14 expressing a desire to proceed with negotiations "just as soon and as frequently as possible" on this "matter of very present importance," and another on May 20 expressing "increasing concern" about the Union's persistent delay despite Respondent's "urgent letter" of May 14. The May 20 letter also noted that management hoped to present the pension plan for adoption at the board of directors' meeting of June 17, and closed with a renewal of Respondent's "urgent request" to meet "as soon as possible and as frequently and as steadily as may be needful."

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46. The Union's merger convention began on June 1.

At the next meeting, on June 10, the Company supplied some requested information. The Union proposed, *inter alia*, an increase in the back service credits; Little replied that the Company thought its proposal generous. On June 11, the Company reiterated its desire to present the plan to the board of directors on June 17. Hoyman spelled out some reservations about the plan, but agreed to its institution at Roanoke Rapids.

Subpoenaed documents show that Respondent had been developing the pension plan since at least January 1975, and by February 1975 had prepared a 34-page draft. The plan had not been put into final form as of April 1976; the parties stipulated that an April 19 draft was the first to employ a flat benefit formula which "resulted in substantially different monetary pension payments to employees."[47] There can be no doubt, however, that Respondent had in fact decided by April 1, when the announcement was made, to adopt a pension plan, and that after April 19, there were only minor changes.[48]

Despite this background, Respondent again followed the pattern of keeping the Union abreast of its unorganized employees—and no more. The Union received an unspecific notice of the plan on April 1, and so did the non-union employees. The Union was given the "Principal Proposed Terms" on April 22, and so were the non-union employees. Although there was, at least by April 19, a draft plan which can fairly be said to have been sufficiently developed so as to permit bargaining, with any caveats

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47. Judging from the draft which succeeded the deleted material, the "formula" simply was the amounts of entitlement for years of credited service.

48. A "revised draft" sent on May 4 to, *inter alia*, Jelks and Little, notes that the changes from an April 30 draft "principally involved the inclusion of definitions of 'Hour' and 'Affiliated Company,' and some additions to the sections on continuous service and credited service."

thought to be necessary, Respondent neglected to furnish a full draft until May 11. How the Union was supposed to engage in bargaining about a subject as complicated as a pension plan on the basis of the 2½ page "proposal" mailed on April 22 is anyone's guess; nonetheless, despite the availability of a full-length draft, the letter forwarding the 2½ page document proposed "bargaining with you on this matter at any mutually convenient time."[49]

What is rather amusing about this particular episode is the correspondence from Respondent in May, expressing the "urgency" it felt about the need for Union capitulation. On none of the prior occasions had it evinced such a serious concern. One is left to speculate as to the existence of an "urgent" desire to present a neat pension package to the board of directors at the June 17 meeting, and then to the Internal Revenue Service, without the potential complications arising from the omission of one group of employees from the plan. That the Union may have derived a certain pleasure from having, for once, at least a foot in the driver's seat, is also, of course, speculation.

There is an awesome demonstration of gall in Respondent's decision to silently work at preparing the pension plan for more than a year, withhold the draft until May 11, and then, a few days later, begin badgering the Union about the necessity for rubberstamping it before June 17. It is clear that rubberstamping is an appropriate characterization here of what Respondent wanted. Little testified, in fact, that although the Union did "suggest that the company consider liberalizing" the back-service credits, "may have" suggested a change in the surviving spouse benefit, and asked that consideration be given to a jointly-

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49. That the basic terms contained in the document were fixed enough to constitute a firm proposal is evident, which would indicate that the plan was virtually fully decided upon by April 22.

administered plan, he "did not consider these to be proposals."[50] Plainly, Little had a single objective in mind, and that was not negotiating.[51]

H. *The ERISA Amendments*

A final subject of litigation, not alleged as an independent violation but which, General Counsel asserts, "provides additional evidence of Respondent's bad faith," pertains to the amendment of the profit-sharing plan to bring it into conformity with requirements established by ERISA. While not of the "Hobson's choice" stripe, the issue seems best included in this section.

I see no need to detail the facts. Respondent began proposing to the Union in December 1975 some plan amendments required by ERISA. As to one of the subjects, the vesting provision, the statute permits several options. The Union expressed an interest in studying the permissible alternatives other than the one selected by the Respondent. The Respondent provided some requested information. On March 3, 1976, the Union said it was agreeable to the institution of changes which the Company "felt were specifically required by law," and, according to

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50. Respondent's minutes show that on June 10, Hoyman "stated that the Union would like some representation in the administration" of the plan; that Little replied that the Company "did give consideraion to," but had rejected, that idea (one of the more unlikely representations made in the course of this bargaining); that Du Chessi asked if "the Company was turning down the Union's proposal;" and that Little said the Company did not consider "the Union's propsal" to be acceptable.

51. Respondent points to an April 21 memorandum from general counsel Foster to board chairman Finley as evidence of its flexible attitude. In the memo, Foster reports that he called the "outside" directors to prepare them for approval of the plan and, in noting their remarks, states that "Mr. Brown commented that there might be some changes resulting from the negotiations at Roanoke Rapids." While that may be read as suggesting Brown's amenability to change, the comment of an "outside" director does not seem to be of much significance.

the Company's notes, a similar discussion was had on March 23. In the latter, according to the notes, even though the Union plainly evinced interest in vesting options other than the one selected by Respondent, Hoyman stated that he "would not endorse each amendment individually but on a broad general basis," and that "the Union will take the new changes and see what they can do with them." This statement was in reply to Little's remark that "the Company interpreted Hoyman's [previous] response as to proceed with the changes." On April 1, in the slide presentation to all employees, Respondent included an announcement of the ERISA changes, including the vesting option.

Since the vesting option announced on April 1 was, as the Union understood from correspondence with Respondent, subject to further amendment until the end of 1976, it may well have been that the Company understood Hoyman to be saying that he would agree to the amendments as presently proposed, but would continue to analyze the permissible vesting provisions for a more suitable alternative. To the extent, therefore, that the asserted inference of bad faith is predicated on Respondent's simply ignoring an expressed desire by the Union for further consultation, I am not persuaded. There was room for misunderstanding.

On the more basic question of Respondent's willingness to modify its proposals in the first place, that seems unlikely, taking into account its characteristic intractability, as discussed above, and, more particularly here, the fact that the "proposals" submitted to the Union in December 1975 were in page proof form. While a letter from Respondent averred that "no implication of finality" was to be derived from such a format, it does give rise to some inference of commitment.

That inference is substantially confirmed in a February 12, 1976, letter from Respondent's general counsel Foster to Morgan Guaranty, sent while the ERISA amendments were still being negotiated, enclosing a "Printer's Proof of the Plan, as amended." That Respondent believed that the amended plan was already fixed in substantive content is disclosed by the following sentence: "There may be some further minor technical changes before it is filed for approval, but none will alter the powers of the Plan Committee as general administrator of the Plan. . . ."

I. *Conclusions as to Bad Faith*

As earlier stated, the isolation of the "Hobson's choice" allegations from the many instances of "bargaining" occurring throughout this period seems somewhat artificial. I am convinced, however, from the particulars and the totality of the evidence discussed above, as well as that analyzed hereafter, that in these instances Respondent did not bargain with an attentive ear and a responsive mind. Accordingly, I conclude, with regard to the profit-sharing supplement, the 1975 and 1976 wage increases, and the group insurance program, that Respondent entered upon negotiations with a closed mind and a determination not to deviate one iota from its proposals, thereby violating Section 8 (a) (5).

VII. The Allegation of Bad-Faith Bargaining

A. *The Relevant Standard*

The principal allegation in these cases asserts that, in their collective-bargaining negotiations, Respondent "negotiated with the Union in bad faith and with no intent of entering into any final or binding collective-bargaining agreement."

The parties first met for the ostensible purpose of negotiating a bargaining agreement on October 31, 1974. Between that date and November 11, 1976, just prior to the commencement of this hearing, they had met some 60 times in formal bargaining sessions. The General Counsel argues that various facets of Respondent's conduct during this period, both at and away from the bargaining table, give rise to an inference of bad-faith bargaining by Respondent. I am persuaded that the claim has substance.

It is useful to set out here the familiar principles applicable to the issue. Section 8(a)(5) forbids an employer "to refuse to bargain collectively with the representatives of his employees . . . ." "[T]o bargain collectively" is defined by Section 8(d) as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement. . . ." An authoritative statement of the duty imposed by the statute appears in *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477, 485:

> Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . .

The foregoing standard has been recast by the courts in various ways: "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . . ," *Globe Cotton Mills v. N.L.R.B.,* 103 F. 2d 91, 94 (C.A. 5); an "unpretending, sincere intention and effort to arrive at an agreement," *N.L.R.B. v. Stanislaus Implement and Hardware Co.,* 226 F. 2d 377, 380 (C.A. 9); "the requirement that the parties honestly attempt to reach an accord." *United Steelworkers of America, AFL-CIO v. N.L.R.B.,* 390 F. 2d 846, 850 (C.A.D.C.).

The standard described is usually characterized as difficult of application. The emphasis, however, on the requisite "serious," "sincere," "unpretending," "honest" intention to "adjust differences," "to reach an acceptable common ground," to "arrive at an agreement," affords a helpful approach for evaluating an employer's performance. While it is recognized as a general proposition that an employer is not required to make concessions or to yield any positions fairly maintained, *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404, the courts have equally acknowledged the authority of the Board to examine those positions in order to determine whether the employer has made a "sincere" effort to "adjust differences." Adroitness, it is recognized, may sometimes be employed to mask insincerity of purpose. "Bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here or there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F. 2d 229, 232 (C.A. 5). For that reason, "[I]t seems clear that if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1); *N.L.R.B. v. Holmes Tuttle Broadway Ford, Inc.*, 465 F. 2d 717, 719 (C.A. 9).

The cases do no more than require that employers respect the "policy of the United States," declared in Section 1 of the Act, of "encouraging the practice and procedure of collective bargaining. . . ." When engaged in negotiations, it is not enough that they "sit almost forever" at a bargaining table and "make concessions here or there." They must, rather, be animated by a "serious

intent to adjust differences." The distinction is subject to figurative expression: an employer may not sit slouched in his chair at the bargaining table, politely discussing terms of employment and occasionally glancing at his watch; he must perch on the edge of his chair, hunched over the table, doing his utmost to reach "an acceptable common ground."

B. *The Evidence Establishing Bad Faith*

In assessing the presence or absence of a subjective state of mind such as good faith, the "totality of the employer's conduct in the circumstances of the case," *Sweeney & Company, Inc. v. N.L.R.B.*, 437 F. 2d 1127, 1135 (C.A. 5), "all the facts viewed as an integrated whole," *Stanislaus Implement and Hardware Co. v. N.L.R.B., supra,* at 381, are considered. The General Counsel here relies particularly on certain discrete items in support of his claim of bad faith, eschewing any significant reliance upon other factors sometimes referred to in these cases. There is no assertion that Respondent refused to meet on a sufficient number of occasions. There is no claim, except for a minor incident, that Respondent reneged on agreements, or made egregiously untimely or confusing modifications of proposals. In a number of respects, the conduct of Respondent was the sort of behavior which may be pointed to as some showing of good faith. Nonetheless, having considered the entire record, I conclude that Respondent sat, talked, proposed, and listened for 2 years without the slightest intention of attempting to compose differences with the Union and reach a bargaining agreement. I rely for this conclusion on the following circumstances.

1. The Contemporaneous Speeches

Pursuant to General Counsel's subpoena, Respondent produced copies of three speeches given by officials of Respondent in August 1976 at plants other than Roanoke Rapids.

Speaking to employees of the West Boylston, Alabama, plant about the Union's then-active organizing campaign, general manager Gregory made the following statements in the course of a hard-hitting speech:

> Our Company has approximately 85 plants and more than 40,000 employees. This plant has less than 500 employees. Yet when Stevens raises wages, it never overlooks this plant. You get the same wage raises and increased benefits, right along with all the Stevens plants and right along with the largest of them.
>
> It is only recently that you, along with all the Company's employees, received a sizable increase. On top of that, you have also recently been given an improved guaranteed pension plan.
>
> If you will think a moment, you will realize that without fail, this Company is raising wages and improving benefits steadily and dependably-right along each and every year.
>
> Do you really think it's likely - does it stand to reason - that if you were to form a Union here at West Boylston, the Company would then give to you higher wage increases and benefits than it has given to any of its 40,000 other employees?
>
> The Unions have been pressuring Stevens in every way possible for many years. There is not a thing that they can do to Stevens that they haven't already tried before. Yet they have never forced this Com-

pany to give to employees in any plant any wage increase or benefits of any kind that it did not give in its other plants.

Upon facts such as these, is it really common sense to believe that by starting a Union up down here at West Boylston, the Company would give in to your Union and come down and put into effect here higher wages and benefits than it has anywhere else? Whoever believes that - is not thinking or reasoning very clearly.

Virtually identical speeches were given by plant manager Wall at Stevens' Milledgeville, Georgia, plant, and by general manager Griffin of the South Boston Group, at Respondent's Angle and Ferrum plants in Virginia.

Direct evidence of an intent not to engage in serious bargaining is rare, but this is one of those cases where it is available. This sort of communication to employees at other plants has been considered "revealing of an intent not to engage in good faith bargaining," *N.L.R.B. v. International Shoe Corporation of Puerto Rico,* 423 F. 2d 503, 505 (C.A. 1).

An appraisal of the speeches makes clear the presence here of the proscribed intent. The portion excerpted carries one simple, vivid, theme: that the existence of a union has never "forced" Respondent to prefer organized employees over unrepresented ones, and it never will. That theme has, for our purposes, two implications. One is the explicit expression of Respondent's state of mind, evidencing a resolute rejection of the possibilities of collective bargaining. Negotiator Little worked out of the Industrial Relations office in Greenville. These speeches were unquestionably prepared at that location. It is simply inconceivable that the same office which drafted speeches vow-

ing that collective bargaining would never result in increased benefits would be capable of sending to the bargaining table a negotiator willing to prove otherwise.

The second implication of the speech is its foreseeable restraint on Respondent's ability to enter into an agreement bestowing benefits on unionized employees more favorable than those being received by its unorganized workers. Given Respondent's untiring resistance to unions over the years, of course, no speeches are necessary to the logical assumption that the most single damaging blow to that resistance would be for Respondent to prefer unionized employees over the others. This Union, waging a widespread campaign throughout Respondent's plants, would predictably hurdle the barricades if its arsenal included the ultimate weapon—a favorable contract.

In recognition of this very real fact of life, Respondent, in the speeches, threw down the gauntlet. In words too plain to be misconstrued, Respondent promised its unorganized employees that it would never betray their trust by granting conditions of employment to union-represented employees more beneficial than those enjoyed by the unrepresented employees. Respondent could naturally anticipate that the slightest crack in this posture would reveal to the unrepresented employees the potential of unionization, which revelation in turn would incite the avalanche Respondent had been successfully forestalling for many years. Having assumed such a position, Respondent could not possibly recede from it.[52]

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52. There is, curiously, a dearth of direct evidence as to whether the package of benefits offered by Respondent during the Roanoke Rapids bargaining exceeded in any way, or simply equalled, the already existing benefits. Hoyman testified, however, that on June 13, 1975, he told Respondent's negotiators that "all of the propsals that they had given us in regard to fringe benefits represented absolutely no change whatsoever

(Continued on following page)

For the foregoing reasons, I find that the August 1976 speeches, made contemporaneously with the Roanoke Rapids negotiations, constitute significant evidence of Respondent's mind set at the bargaining table.[53]

2. The Dilatory Submission of Counterproposals

General Counsel points to the sluggish flow of counterproposals by Respondent as evidence of its lack of serious intent to engage in productive bargaining.

On October 31, 1974, the Union presented proposals, three of them somewhat incomplete, on 17 subjects. On November 8, the Union mailed Respondent 8 more proposals, 5 of them incomplete. On December 11, the Respondent presented 8 substantive proposals; three of these separately addressed the three subjects included in the Union's Recognition clause, i.e., recognition, work by supervisors, and nondiscrimination. On December 12, the

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Footnote continued—

from the fringe benefits which were in effect prior to the Union winning the election in August of '74." The Company's notes for that meeting fully corroborate Hoyman. They also show that Little did not deny the claim, but simply replied, "[W]e assure you we will give, we will continue to give these matters serious consideration." The testimony of Fitts, on cross-examination by the Charging Party, also indicates that Respondent's proposals did not vary any existing benefits.

Presumably, it would have been helpful to General Counsel's case to establish that the proposed benefits did no more than maintain the *status quo*. In my view, however, evidence that Respondent was proposing increases in fringe benefits over those currently being received by other employees would have been even more valuable to Respondent's argument. In absence of such proof, and in view of Hoyman's uncontradicted testimony, I must assume that no increased fringe benefits (I do not consider such items as access to bulletin boards) were being proposed by Respondent.

53. In addition, the speeches, promising exact parity among employees, leave no doubt that the "bargaining" about the extracontractual benefit improvements earlier discussed was, insofar as the Union might have hoped for substantial variation, mere formality.

Union completed most of its earlier incomplete proposals. With two exceptions, Seniority and Workweek, as to which the Union was seeking information, this substantially comprised the Union's contract proposals.

On January 8, 1975, the Respondent submitted redrafts of three of its earlier proposals and, as well, three new proposals. On January 20 and 21, the Respondent submitted a third draft of its Recognition clause, a second draft of five other proposals, and five new proposals.

On February 11, the Company presented a one-sentence proposal on Shift Premium Pay in response to a one-sentence proposal completed by the Union on December 12, a second draft of two other proposals, and a third draft of another. On March 4, the Company submitted a two-sentence no-dues-checkoff clause in response to the Union's Checkoff proposal of November 8, and a one-sentence Insurance proposal replying to the Union's proposal completed on December 12. On March 11, Respondent submitted a one-half page Profit Sharing and Retirement Benefits proposal in answer to a Union proposal initially offered in incomplete form on November 8 and completed on December 12; a Term of Agreement clause in response to a similar provision offered by the Union on November 8; and a Rates of Pay clause (calling for payment of existing wages) in response to an incomplete Union proposal of November 8, which was completed on December 12.

On March 26, Respondent for the first time submitted proposals on such significant items as Safety and Health (the Union's proposal was made October 31), Workweek, Hours and Overtime (the Union's first proposal was on October 31), and a complicated proposal on Pay Practices (the Union had made no prior proposal), as well as a revised draft (its third) on Holidays and Holiday Pay. On April 9, the Company submitted its first (2-1/2 page)

proposal on the important subject of Work Assignments, responding to a lengthy and virtually complete Union proposal submitted on November 8. On August 13, Respondent submitted a proposal on the subject of Strikes and Lockouts, in answer to a Union proposal on that subject handed to the Company on October 31; the proposal was drafted at the behest of the Union, which had been urging Respondent to formalize its position that, since there would be no arbitration, the Union would be free to exercise its "economic strength." According to the Company's notes, unconvincingly disputed by Little, Respondent had promised 7 months before, on January 9, that it would furnish such a proposal at the "next meeting."

There was delay on both sides in preparing a seniority proposal. On December 5, 1974, the Union, noting earlier discussions on the subject, wrote the Company that it had not yet made a proposal on seniority because of its lack of knowledge of the existing operations and practices. The Union requested some equal employment data, and asked the Company to furnish "at least an outline" for an acceptable seniority system. The requests were apparently discussed on December 11, and, on December 30, Respondent wrote a letter, on the subject of the "working out of proposals on the subject of seniority," which simply suggested that both parties be prepared at the next meeting to discuss "what provisions on the subject of seniority would be practical and workable and at the same time in keeping with the equal employment opportunity laws." The subject was again discussed on January 9, and, on January 23, the Company provided the Union with the information requested on December 5. A Title VII action then pending against the Company required the Union to examine the "voluminous" papers in that action.

On April 30, 1975, the Union submitted its seniority proposal; the issue was thoroughly discussed on that day

and the next; and the Union again asked the Respondent for "some kind of initial or preliminary proposal" on seniority. The Respondent submitted no proposal on seniority until September 23, 1975, about 11 months after bargaining began. The Company proposal would have, in part, reoriented the seniority system from departmental to plantwide.

Little explained Respondent's delay in submitting a seniority proposal as attributable not only to the inherently complex nature of the subject matter, but also to the Respondent's problems in understanding the manner in which the Union's proposal would operate, problems which had consumed considerable time at the bargaining table, as well as the pendency of the Title VII action which could be anticipated to affect the substance of the seniority provision. Little conceded that on "several occasions," the Union asked for a Company proposal on seniority, and that on June 13, 1975, he said Respondent was working on one and hoped to submit it soon. Despite the fact that most of the problems had existed from the beginning of negotiations, however, Little testified that it was not until July 10, 1975, that he asked Hoyman to think about the possibility of deferring on the subject of seniority. When Hoyman opposed the suggestion, the Company submitted its proposal some 2-1/2 months later, which would indicate that it had not seriously begun work on it before July.

As of the time of the hearing, very little progress toward agreement on a contract had been made. Proposals covering approximately 28 subjects were laid on the bargaining table (taking into account that some separately labeled proposals from each side addressed the same basic subject matter). Only 7 articles have been tentatively agreed to.[54] It is worth noting that it took nearly 5 months

54. I do not include an informal agreement made at the first bargaining session relating to Union access to the plants.

from the time of the Union proposals in October 1974 until the ice was broken by the Union's agreement to accept Respondent's Recognition clause in March 1975; that the second agreement, on the Union's Non-Discrimination language, was not reached until some 8 months thereafter, in November 1975; and that no further agreements were made for 8 months, until the complaint in this case was issued on July 1, 1976. Then, in a burst of amity, four more articles (on Probationary Employees, Educational Courses, Jury Duty Pay, and Bulletin Boards) were agreed to between July 21 and August 13.

While I have not detailed all of the facts pertaining to the exchange of proposals, it is fair to characterize the Company's response to the Union's proposals as phlegmatic. The great bulk of the Union's clauses had been furnished by December 12, 1974. The Respondent doled out its proposals in miserly fashion thereafter, sometimes allowing 5 or 6 months to pass without counteroffer. Although the Company often furnished 3 or 4 drafts of proposals, they were, by and large, minor modifications of its original proposals on the subjects; it took, altogether, 4 drafts, the last submitted on June 13, in order for the Company to conform its Holiday Pay proposal with Company policy. Respondent's delay in furnishing a seniority proposal cannot be adequately explained by the pending Title VII action or the other excuses advanced, considering the fact that the Union had been urging preparation of such a proposal for many months. The Company negotiators were not tyros at bargaining. Little had engaged in prolonged negotiations with Hoyman at the Statesboro plant. Furthermore, the record shows continuing recourse by Respondent to an experienced labor attorney.

It is manifestly detrimental to the Union's preservation of employee support to delay the submission of proposals. In *Bewley Mills*, 111 NLRB 830, 831, the Board

found a delay of "almost 7 weeks" in submitting a counterproposal to be a factor indicative of bad faith. Employees select a union so that a collective-bargaining agreement may be negotiated. When the employer takes 6 months or a year just to submit proposals, it can reasonably foresee the erosive effect of such dilatoriness on a union's strength among the employee population. The lack of diligence manifested here by the Respondent strongly suggests that such an effect was deemed desirable.

3. The Respondent's Position on Arbitration

In November 1974, the Union presented proposals which provided for a grievance procedure and referral of unresolved grievances to binding arbitration. At a November 14, 1974, meeting, the Union stated that arbitration was a "must" item. While the Respondent submitted, on December 11, a grievance procedure proposal of its own, it took a dim view, from the start, of the concept of third-party arbitration, on that ground that it did not want uninformed strangers to decide its labor disputes. When the subject was discussed on January 8, 1975, Little said that if the Union was unhappy with the disposition of a grievance after the fourth step, it "should use its economic strength," causing Du Chessi to accuse Respondent of proposing "jungle warfare." The Union requested Respondent to fashion a specific proposal about the Union's right to strike over grievances.

On August 13, after some further urging, the Company submitted its Strikes and Lockouts proposal, which authorized the Union, in the event of an unresolved grievance, to call a "general strike of all the employees in the bargaining unit," accompanied by "peaceful" and "lawful" picketing, but permitted no other kind of strike, and made the Union liable in damages for violating, "either directly

or indirectly," any obligation or restriction imposed in the article. On October 23, 1975, according to Little, Hoyman said the Union "could not live with" such a proposal and accused the Company of intending that result.

On July 21, 1976, Hoyman stressed the fact that the arbitration clause was a "central proposal" by the Union, calling the process "one of the important social inventions of this century." He pointed out, as the Company had conceded early on, that the Company engaged in arbitration of disputes under its commercial contracts, and that the Union had reached agreements with other Southern textile companies which provided for arbitration. The Respondent said that it had heard these arguments before. Later discussions on the subject broke no new ground.

At the hearing, Little restated the Company's opposition to a binding arbitration procedure. In explaining why the Respondent did not object to use of an arbitrator in disputed commercial transactions, in contrast to labor contract disputes, Little testified that the latter often results in decisionmaking by "individuals who, in many instances, have little if any knowledge of the subject matter and the operations that they are dealing with," whereas commercial arbitration is "handled by individuals who are highly competent, highly knowledgeable about the subjects that they are dealing with." Although Hoyman did not so testify, Little said at the hearing that, during the negotiations, the Union "may have" proposed, in order to assuage his concerns about an uninformed arbitrator, that technical workload disputes be assigned to a qualified time study engineer.

While aware that other mills had agreed to arbitration clauses, Little did not consult them about the viability of the procedure. His prior experience with a company which had an arbitration system led him to believe that

the unfamiliarity of arbitrators with an industry made them undesirable. While he had no "familiarity" with permanent umpire systems such as obtain in the steel industry, he did have "some very general and non-specific awareness that there is some sort of arrangement. I never have been clear as to what it is."

In this relatively enlightened era of the industrial relations revolution, it gives one pause to come upon an employer refusing to agree to an arbitration procedure and proposing instead that a union attempt to call a general strike of 3000 employees in order to resolve a grievance which may involve no more than one employee's failure to receive proper premium pay. After all, more than 17 years have passed since the Supreme Court acknowledged, in *United Steelworkers of America v. Warrior and Gulf Navigation Company,* 363 U.S. 574, 578, a judicially noticeable fact of life: "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

It came also as something of a surprise to learn that in the past, the Union has entered into agreements which failed to include arbitration clauses but did contain no-strike clauses. These contracts were built on what Hoyman called the "Blakeney formula," named after the management attorney with whom the Union has often dealt. The formula omitted arbitration and dues checkoff provisions and forbade the Union from striking. The Union's experience with the package was bitter, Hoyman said, and the Union had determined early in these negotiations, and so told Respondent, not to accept such a proposal again. In an interesting discussion of the package recorded in Respondent's notes for November 12, 1975, Hoyman told Little that the "results have been disastrous. The locals have died. Hoyman said the Company's proposals would destroy the Union. Little told Hoyman he had made his point."

It would seem that the clarity with which Hoyman "made his point" left no doubt about where the levers of control lay in these negotiations.[55] Respondent knew the importance of arbitration to the Union, reacted as might be anticipated, and clung tenaciously to its rejection of the concept.[56]

The refusal to arbitrate thus being a given, Little slouched back in his bargaining chair. "The employer cannot claim that he satisfied the statutory obligation by solemnly attending bargaining sessions where checkoff was nominally on the agenda, then reciting that checkoff was being rejected as a matter of principle." *United Steelworkers of America, AFL-CIO v. N.L.R.B., supra,* 390 F. 2d at 852. Little did, however, advance a reason for refusing arbitration—the fear of having uninitiated strangers settle contractual disputes. But to have allowed that apprehension to control such a profoundly important issue, grounded as it purportedly was only in a past personal experience in which labor arbitrators had sometimes made "inappropriate" decisions, was to abdicate the statutory obligation to attempt to adjust differences. Little distinguished the Company's willingness to arbitrate commercial disputes by reference to the "highly competent, highly knowledgeable" individuals who serve in such roles. But while he acknowledged awareness of the permanent umpire arrangement, he had "never . . . been clear as to what it is."

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55. On March 4, 1975, the Union stated that "the key issues" were arbitration, checkoff, and seniority.

56. I believe in only a limited sense Little's testimony that his superiors had not instructed the bargaining team "to agree or not to agree to arbitration;" there was no need for such a specific instruction. Respondent, bargaining through Little, had espoused the same position a few years before in the Statesboro negotiations, and it is ludicrous for Little to testify that the arbitration proposal was rejected at Roanoke Rapids only after the bargainers "deliberated among ourselves; we came to that view of arbitration . . . ."

The salient fact, assuming *arguendo* the existence of a genuine concern about uninformed interlopers, is that Little never attempted to supplement his lack of knowledge. Nor did he, again indulging that assumption, inquire of other textile mills as to their experience with the arbitration process, in order to test whether his own exposure to the system had been an aberration.

I do not for a minute believe Little's testimony as to the reason why he rejected the arbitration concept. Even if I did, however, by his own admission Little failed to make any effort whatsoever to examine the validity of his premises or to search out a workable compromise of this unmistakeably central topic. His testimony that the negotiators fended off arbitration because "we have not been persuaded" is entirely too narrow a view of the statutory obligation. In assessing *bona fides*, the Board is entitled to consider the employer's "failure to do little more than reject" a proposal, *N.L.R.B. v. Century Cement Mfg. Co., Inc.*, 208 F. 2d 84, 86 (C.A. 2).

General Counsel and Charging Party further contend that the strike clause finally provided by Respondent was "punitive," justifiably giving rise to an inference of bad faith. As noted, the clause was drawn up only after the Union insisted that Respondent define in writing its offer to allow the Union to "use its economic strength" in the resolution of grievances; apparently, Respondent had not intended to formalize the proposal.

It must have been obvious to Respondent, once prodded into action, that the requirement that the Union call a "general strike of all the employees in the bargaining unit"—some 3000 employees—whenever it desired to protest the resolution of a single grievance pertaining to a single employee, would have been totally unacceptable. Even in *N.L.R.B. v. Tower Hosiery Mills, Inc., supra,* 180

F. 2d at 703-705, where the Court inferred bad faith from a proposal on this same subject on the ground that the employer seemingly had "cull[ed] the most drastic provisions it could discover embodied in other agreements," the provision proposed in that case would have permitted a "general or partial strike." Although the record here does not show sufficient discussion to warrant a conclusion that Respondent maintained an absolutely adamant stand on this proposal,[57] the very offer itself, as a substitute for the limited and civilized solvent of arbitration, suggests Respondent's lack of commitment to reaching ultimate agreement.

4. The Respondent's Position on Checkoff

In 1974, the Union submitted a proposal providing that Respondent would, upon written authorization by employees, deduct union dues from their wages and forward them to the Union, an arrangement commonly known as "dues checkoff." In March 1975, Respondent submitted a proposal simply providing that employees were free to join or not join the Union, and equally free to pay dues to it or not. On April 9, 1975, Little said that the Company's sole objection to checkoff was that "it would decrease an employee's take-home pay, and decreasing an employee's take-home pay increased the pressure on the Company for wage increases."

Hoyman thereupon amended the Union proposal to meet this objection. He proposed that the employee authorization would contain a provision automatically reducing, by the amount of the dues, other voluntary deductions currently being taken from the employee's wages.

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57. There was some discussion, however, in which Little defended the concept of a general, as opposed to a partial, strike over grievances.

Little said that Respondent would consider the amended proposal.

Five bargaining sessions passed without mention of checkoff. On July 10, 1975, Respondent said that the "deduction swapping" modification did not make Respondent more content, since it had concluded that giving checkoff to the Union would result in "other outside organizations" seeking the same privilege of having monies deducted from employee wages, and would make the Company, in Little's words at the hearing, vulnerable to claims of "discrimination" and "favoritism" if it did not grant all such requests.

The record shows that Respondent will deduct, upon authorization, employee payments for United States Savings Bonds, for group insurance coverage, for tools for which the employee is repaying money owed to the Company, and for a charity drive.

Annually, Respondent sponsors among its employees what it terms a "Consolidated Charities Drive." The drive benefits not only the community United Way campaign and its inclusive charities, but also a number of other causes to which employees may wish to contribute. The solicitation card lists the United Way agencies and the additional agencies chosen by Respondent, and, as well, provides a blank space for employees to specify other donees. A 1973 memorandum about the drive provided, however, that its purpose was to collect funds "primarily for welfare and service agencies in our community which derive their support from contributions and which do not charge fees for their services." In 1973, contributions to private schools, which are "supported by the people who patronize them plus contributions," were not to be accepted. In the October 1974 campaign, this proscription was expanded to churches, because, according to Fitts, there had been several such contributions in 1973. The

Company posts notices about the drive and supervisors hand out pledge cards to employees. Although Fitts testified that "[s]olicitation is a rather strong word" for what the supervisors do, his 1973 intramural memorandum to officials exhorted, "Let's all join together and make this campaign the best one ever."

The only reason initially advanced for refusing checkoff was the fear of a drain on employee resources which would result in increased pressure for higher wages. The Company concedes, as it must, that checkoff of dues would not, under its present system, be an administrative burden. The wage-pressure objection sprang simultaneously into the minds of the Company negotiating team, according to Fitts: "there were perhaps as many as two or three that expressed that almost instantly." This described genesis of the objection seems remarkably innocent of the fact that, in 1972, Respondent had taken the identical position in the Statesboro negotiations.

It is also seemingly inconsistent with the fact that Respondent permits unlimited deductions for savings bonds and for the charity drive, and, as to the latter, not only actively encourages such deductions but, in the grip of enthusiasm, has added charitable agencies not even included in the United Way campaign. When an employer sponsors a process for some purposes which will foreseeably result in such accelerated wage demands, but expresses an apprehension of a similar result when union dues are involved, the legitimacy of its concern may be seriously questioned.

The refusal became more mendacious when the Union restructured its proposal to assure that dues checkoff would not reduce take-home pay. The testimony of the Company negotiators as to the manner in which they formulated their response to this modification is of interest. Little

testified that only the bargaining committee members participated in the discussion, although he was certain that "our legal counsel was informed to keep him advised." Fitts, however, clearly remembered that it was at one of then-counsel "Blakeney's meetings" at which, with Blakeney present, the alternative proposal was discussed for two or more hours.

The modified proposal completely vitiated the wage-pressure argument. From the Blakeney meeting, however, a second line of defense was thrown up—that allowing the checkoff privilege to the Union would result in a "deluge" of requests by other organizations, subjecting the Company to claims of "discrimination" and "favoritism."

This rationalization is sheer balderdash. As the Charging Party points out, Stevens was already "choosing among claimants." There is no indication that the local churches or J.C. Penney had ever previously complained that they were being discriminated against because employees could check off money to the Boy Scouts, but not to them. There was no basis for Respondent to reasonably fear that such protests would be made if it granted checkoff to the Union, or indeed, if made, that Respondent would suffer repercussions (would Montgomery Ward have refused to trade with Respondent's employees because it felt slighted?). Even if there had been any real substance to the asserted concern, Respondent could have certainly agreed upon a checkoff for the first contract, renewal being expressly contingent upon any perceived adverse reaction in the community. Even the most theoretically hypersensitive employer, truly concerned about that possibility, but also interested in concluding an agreement, might well have made such an offer; Respondent did not.

There was, of course, no reason at all for Respondent to entertain such a concern. Furthermore, I feel safe

in describing as absurd the implicit premise that local merchants would somehow have failed to grasp the distinction between treatment accorded to them and to a labor organization appointed by the employees as their bargaining representative pursuant to federal law. One also feels justified in asking why, if there had been serious Company deliberation about the Union's original proposal, this factor of community rebellion was not initially advanced along with the wage-pressure argument; in fact, it became a compelling consideration only when the Union rendered the first line of defense untenable.

The fragile positions taken by Respondent were spurious; they disintegrate upon scrutiny. The Court said in *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, *supra*, 390 F. 2d at 852, dealing with an employer's response to a checkoff clause, that "good-faith bargaining requires 'honest claims'." These were not honest claims.[58]

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58. Discussion of this subject is incomplete without reference to a recent contempt proceeding before the Fifth Circuit, *N.L.R.B. v. J.P. Stevens & Co., Inc.*, 538 F. 2d 1152. That case concerned the 1972 bargaining at Statesboro, which, on the checkoff issue, followed much the same pattern as here, except in two respects: at Statesboro, there were no allowable deductions for charities, but there was a flourishing credit union to which employees could designate deposits. The Union's alternative proposal, when confronted with the stroke-the-fires-of-wage-dissatisfaction contention, was to suggest substitution of union dues deductions for existing credit union deductions. The Company perceived the proposal as affecting the "continuing viability of the credit union."

Although recognizing that "[e]very position on issues of mandatory bargaining, like dues checkoff, must reflect a legitimate business purpose, otherwise the company has not bargained in good faith," the Court disagreed with the Special Master's recommendation rejecting Respondent's defense, and found a "legitimate business purpose" in that Respondent "was not required to sacrifice a [credit union] program already in successful operation." The situations are, as can be seen, quite different. At Roanoke Rapids, Respondent had no credit union and evinced no interest in protecting the integrity of the existing recipients of voluntary allotments. Further, at Statesboro, there was no affirmative solicitation for non-work-related causes as there is at Roanoke Rapids.

5. The Authority of Respondent's Negotiators

Little's testimony as to the authority possessed by Respondent's negotiating team was slippery. He said that the negotiators were authorized to "enter into bargaining, make proposals, and to reach agreements," and, in doing so, had "discretion to make judgements." But he also testified that in order to depart from existing guidelines on major monetary items, it would be necessary to seek approval from higher officials, and, at another point, that "decision-making authority" over "industrial relations policy" resides in the "top management of the company." The two descriptions of his position defy reconciliation, unless the self-attributed "discretion" relates only to minutiae; on that reading, the extent of Little's authority was only to enter into agreements within the framework of current policy, subject to exceptions being granted by top-level executives.

In *N.L.R.B. v. Coletti Color Prints, Inc.*, 387 F. 2d 298, 304 (C.A. 2), the Court said, "Under our present labor law, there certainly is no duty on the part of an employer to be represented at the bargaining table by a person with competent authority to enter into a binding agreement with the employees, although the bargainer's lack of such authority is a factor to be considered in evaluating the employer's good faith. [citations omitted]." And recently, the Board stated, "It is well established that employers may not be faulted for their failure to give their bargaining representatives the final authority to enter a binding agreement on all contract proposals provided that the limitation does not act as a hindrance on [sic] the overall negotiations," *Gulf State Canners, Inc.*, 224 NLRB 1566, 1577. Accord, *Great Western Broadcasting Corp.*, 139 NLRB 93, 130; *Midwestern Instruments, Inc.*, 133 NLRB 1132, 1139.

An illustration of the limitation-as-hindrance is found in *Miami Swim Products,* 145 NLRB 1348, where the representative was invested with the limited authority to negotiate a tentative agreement, was instructed not consult with his principals about proposals during the course of negotiations, and was not informed by the principals as to the nature of their operations, their economic situation, or their bargaining objectives. See also *N.L.R.B. v. Fitzgerald Mills Corporation,* 313 F. 2d 260, 267 (C.A. 1), where the Court noted circumstances in which the limited authority of the negotiators created "inherent possibilities of delay," and held that the restriction created "an obstacle to the bargaining process which lends weight to the Board's conclusion that the Company intended that no agreement be reached."[59]

Despite Little's statement that his committee was possessed of discretionary authority to enter into agreements, his other testimony, and the record as a whole, clearly establish that they were not empowered to exceed existing policy without permission. There are "inherent possibilities of delay" in such a situation, particularly since Finley and Stevens, the executives who passed on the formulation of major policy, were located in New York.

These possibilities might be mitigated, where the decision-makers are not themselves negotiating, by the establishment of a precise channel of communication between principal and agent, so that the principal will be quickly and fully advised of the union's positions and arguments, and the agent will be sufficiently privy to the sources

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59. There is, however, another line of cases which appears to give considerably more weight, as a factor indicating bad faith, to the absence of the principal from the negotiations. *Wal-lite Division of United States Gypsum Co.,* 200 NLRB 1098, 1100; *Jeffrey Stone Co., Inc.,* 173 NLRB 11, 15; *M.F.A. Milling Company,* 170 NLRB 1079, 1096-1097.

of power to properly convey to the union relevant information regarding the employer's proposals. The record here, however, strongly intimates the absence of any such communication system.

While Little testified generally that he kept his superior, Jelks, informed of the progress of the negotiations, and said that general manager Beeks did the same with the higher operational officials, there is not a shred of evidence that Finley and Stevens were ever apprised of the Union proposals or of any arguments in their support. Little testified, in fact, that recommendations for deviations from Company policy would be made only if the committee found them to have merit.[60] This clearly indicates two facts: one is that the committee itself was bound by existing policies; and the other is that proposals for changes in guidelines could only be entertained by the guideline-makers if the committee thought them worthwhile.[61] But the committee plainly saw no merit in proposals unless the Company had initiated them; thus, when the Union sought wage increases in 1975 and 1976, the committee *assumed*, according to Little, that the Company thought its wages competitive because the committee had not been notified to the contrary. The operation of this Catch-22 device simply screened out all proposals made by the Union, precluding a fair presentation of the Union's case to the only individuals who were capable of accepting them. That is not collective bargaining.

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60. Little was probably theorizing, since no such proposals were ever found meritorious.

61. How, in fact, the system would work was not known to Little. Asked about a hypothetical situation in which the committee found merit in a proposal for doubling the shift premium immediately, Little stated that he would inform Jelks and local management would inform their superiors, but "how it would be handled from there, I can't tell you."

Taking Little's testimony at face value, the record also shows a distressingly torpid channel of communication in his direction. As shown above, he often professed to have only a nodding acquaintance with important pending personnel actions. His committee was offering to bargain about the insurance and pension programs without having the "details." He purportedly did not even know that the profit-sharing floor was being considered until the evening before the announcement was made throughout the enterprise. With respect to the wage increases, Little conceded that his affirmative statements prior thereto, that the Company viewed present wages as competitive, were not based on any information received from the Company, but on his own supposition based on an *absence* of communication. Respondent's asserted failure to communicate with its negotiators betrays a total disinterest in the success of the bargaining relationship.

6. The Benefit Improvements

Having discussed at length the "Hobson's choice" issues, I will do no more there than say that Respondent's conduct in those transactions often displayed disdain toward the rights of the Union as a bargaining representative. Respondent treated the Union as an intruder, one which required some watching after, rather than as a statutorily-invited guest on the premises. There is convincing evidence in these matters of an inclination to engage in no more than nominal bargaining with the Union.

7. Respondent's "War Against Unionization"

Finally, it would take a remarkably punctilious mind to ignore the factor of Respondent's "now all too familiar pursuance of full-scale war against unionization," *J.P. Stevens & Co., Inc. v. N.L.R.B.*, 441 F. 2d 514, 521 (C.A. 5).

In *N.L.R.B. v. Reed & Prince Mfg. Co., supra,* 205 F. 2d at 139, the Court stated:

> We do not think it would be error, in a case like this, for the Board to take account of the prior history of the Company's labor relations . . . . The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind . . . .

To be sure, Respondent should be indulged the presumption of having determined to turn over a new leaf with these negotiations. But there is no evidence to inspire confidence that such a resolution was ever made. For example, I know of no instance in the past 14 years in which Respondent, going beyond the compulsory notice posting, mailing, and other remedies required by past litigation, has evidenced good faith by voluntarily impressing upon employees any sense of renewed commitment to honor and respect their exercise of statutory rights. The evidence in this case shows not only the absence of such a resolve, but in fact displays Respondent's intention to trade on its Roanoke Rapids misconduct at other plants.

I detect no sign of regeneracy. Therefore, while I am firmly convinced that the evidence in this case standing alone clearly proves the complaint allegation, my conviction is heightened by Respondent's 14 years of obstinate recidivism.

8. Conclusions As to Bad-Faith Bargaining

The circumstantial evidence of bad faith discussed above describes an employer whose chief concern in the operation of the bargaining relationship was to prevent the Union from obtaining any advantage it might normally derive therefrom; whose discernible awareness of the obligations owed the Union was often accompanied by a demonstrable apathy toward those obligations; and whose

bargaining table posture was that of a polite, patient, and occasionally dissembling auditor, rather than a vitally interested participant.[62] The direct evidence—the speeches, which must be taken as truly indicative of Respondent's attitude—confirms that Steven's corporate mind was tightly shuttered against alien winds of reason and persuasion. The record as a whole indicates that Respondent approached these negotiations with all the tractability and openmindedness of Sherman at the outskirts of Atlanta. I must conclude that Respondent was without "serious intent to adjust differences and to reach an acceptable common ground," *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO, supra.*[63]

In so concluding, I have not given much weight to the few violations here found of unilateral action and failure to furnish information. Against the whole factual matrix, those instances are isolated; as Respondent demonstrated, much information was supplied over the pertinent period and many consultations were held.[64]

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62. "[W]hile some of the various instances of obstinacy and unreasonableness on the part of the Company may have been insufficient in themselves to support a charge of bad faith, viewed collectively and in proper context, they demonstrate a deliberate pattern of contumacy which cannot be ignored." *Matlock Corporation v. N.L.R.B.*, 94 LRRM 2460, 2461 (C.A. 6). I have not referred here, in the interest of brevity, to several other items, such as Respondent's concealment of its medical program, which may also be construed to suggest a predisposition to ignore the Union.

63. "The mere willingness of one party in the negotiations to enter into a contract of his own composition also does not satisfy the good faith bargaining obligation." *Wal-lite Div., supra,* 200 NLRB at 1101; *United Steelworkers of America v. N.L.R.B., supra,* 390 F. 2d at 849.

64. One cannot overlook, however, the meanness of spirit sometimes exhibited in these incidents by individuals appointed by Respondent to attend to such matters: Warren's concession, for example, that he would not supply a terry inspector's rate sheet to Bush because Bush had already received one from an employee; his similar treatment of Bush's request for a copy of the vacation notice; Gardner's refusal to provide the Union, for no conceivably valid reason except the arguably one of relevancy, with published, readily available, loom operators' efficiency ratings.

The evidence of such cooperation by Respondent is relevant, but does not prove a great deal. Respondent kept many records: between September 1974 and March 1977, there were 209 "Strawn-Gardner" meetings, consuming some 600 hours, at which operational and personnel matters were discussed; there were about 1120 telephone conversations with Union representatives, amounting to more than 200 hours; 240 requests for information were satisfied; there have been 45 plant visits by Union agents. Respondent was required by law to discuss mandatory subjects and supply pertinent information; the fact that it did so does not unduly quicken the pulse. What is perhaps more revealing is that in not one of the 500 or so instances of proposed discharge or discipline discussed with the Union did Respondent change its mind.[65] Respondent might well be found wanting were a statistician to calculate the probabilities of its good faith on the basis of those figures.

I find, accordingly, that Respondent bargained with the Union in bad faith and wtthout any intention of concluding a collective-bargaining agreement, in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent, J.P. Stevens & Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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65. The single exception of a display of flexibility to which Warren could definitely attest happens to be the case of Brenda Futrell, who was given a one-week trial period, and then discharged. Warren also testified to four unspecified proposed personnel actions in which Respondent assertedly altered its position; while he said that the Union was informed of the changes of heart, Bush denied receiving such information, and I believe him. In view of Respondent's penchant for keeping meticulous records of any data which might cast a favorable light, I cannot accept that if Respondent did modify its stance as asserted, the modification would have gone undocumented.

2. Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC ("the Union"), is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the legal continuation of Textile Workers Union of America, AFL-CIO, and has been and is now the exclusive representative for purposes of collective bargaining of the employees of Respondent in the bargaining unit at Roanoke Rapids, North Carolina, covered by the certification issued by the Regional Director for Region 11 on September 6, 1974.

4. By refusing, since October 31, 1974, to bargain in good faith for a collective agreement covering the certified unit; by unilaterally changing, in or about September 1974, its practice pertaining to free time for double-shift work; by unilaterally changing in or about December 1974, its method of computing holiday pay for fabricating plant employees; by unilaterally selecting, in December 1976, the kind of respirator to be used by employees; by unilaterally changing, in January 1976, the profit-sharing plan; by unlawfully refusing, on and after February 19, 1975, to supply information relevant to the discharge of Brenda Futrell; by unlawfully refusing, on and after July 9, 1975, to supply information relevant to the change in the jobs of terry inspectors; by refusing, on and after December 16, 1976, to supply information relevant to the respirator requirement; by bargaining in bad faith, in January 1975, about the profit-sharing plan supplement; by bargaining in bad faith, in August 1975 and thereafter, about a general wage increase; by bargaining in bad faith, in April 1976 and thereafter, about a general wage increase; and by bargaining in bad faith, in September 1976 and thereafter, about changes in the group insurance program, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not otherwise engaged in conduct violative of the Act as alleged in the complaints.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take affirmative action necessary to effectuate the policies of the Act.

Aside from the customary bargaining order, General Counsel pleaded in the complaint, and contends on brief, that "Respondent should be directed, upon request to bargain with the Union or any other labor organization in an appropriate unit at *any* of Respondent's plants, warehouses, or other facilities, provided the Union or any other labor organization is certified or the Respondent has engaged in conduct disruptive of the election processes, thereby precluding the holding of a fair election, and the labor organization involved enjoyed majority status" (emphasis in original). General Counsel argues that since this record, and the prior cases involving Respondent,[66] clearly demonstrate a corporatewide proclivity to avoid statutory obligation, such a broad remedy is amply justified.

General Counsel does not discuss the objective or the implications of the remedy requested. It would appear that its purpose is to create a basis, after court enforcement of

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66. In *N.L.R.B. v. J. P. Stevens & Co., Inc.*, ... F. 2d ....., 96 LRRM 2150 (August 31, 1977) (C.A. 2), the Court helpfully points out that the first twelve *Stevens* cases are collected at *Textile Workers Union of America v. N.L.R.B.*, 475 F. 2d 973, 974, n. 1, and then lists the five subsequent cases. The Court notes that the case before it is *Stevens XVIII;* this one, absent intervening litigation, will be *Stevens XIX*.

the present case, for bringing a contempt action in future Section 8(a)(5) recognitional cases arising elsewhere in the enterprise, where ordinarily the allegation might be brought to the Board in the first instance.

A similar request—"that the Respondent should now be ordered to bargain at such time in the future when, with respect to any appropriate single-store unit, it either secures a card majority or the Respondent becomes lawfully obligated to bargain with respect to such unit"—was rejected by the Board in its Supplemental Decision in *Heck's, Inc.*, 191 NLRB 886, 888, the Board concluding that the proposed remedy would not be demonstrably more expeditious and would require resolution of representation issues by a special master which are best subjected to the Board's administrative expertise. I see no convincing reasons in the present case for recommending departure from the Board's persuasive rationale in *Heck's*. See also *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 ("It is for the Board and not the courts, however, to make that determination [of the appropriate remedy], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity.")

It does seem proper, however, to extend the scope of the recommended bargaining order to all facilities of Respondent at which, as here, the Union's representational entitlement has already been established. The predicate for such an order is the fact that in the only two locations in which Respondent has been formally required to bargain with the Union, Roanoke Rapids and Statesboro, it has been found to have engaged in unlawful bargaining. *Stevens XVII*, 538 F. 2d 1152 (C.A. 5) (Statesboro). That factor applies particularly to the scope of the bargaining order, but there are other considerations which indicate the appropriateness of corporatewide remedies, both with

respect to the bargaining order and to the remedies to be recommended below.

It is elementary that Steven's efforts since 1963 to repel the Union's organizational campaign are founded in basic company policy. In *Stevens I*, 380 F. 2d 292, 304 (C.A. 2), the Court said, "[T]he evidence shows that the Company's policies were not determined at individual plant levels alone." Two years later, in *Stevens V*, 417 F. 2d 533, 537, the Court of Appeals for the Fifth Circuit stated, "Stevens has been engaged in a massive multistate campaign to prevent unionization of its Southern plants . . . . Thus, we assay the order in this atmosphere of persistent, long continued, flagrant violations occurring after and in spite of repeated declarations of illegality by Board and reviewing Courts." That was written 8 years, and 13 cases, before *Stevens XVIII*, in which the Court of Appeals for the Second Circuit noted that Respondent has earned a "reputation as the 'most notorious recidivist' in the field of labor law," leaving the impression that "the Company has engaged in a 'program of experimentation with disobedience of the law'." 96 LRRM 2150, 2152, 2159. The evidence found in the present record fails to dispel that impression of corporately designed lawlessness.

Not only does the impetus for Respondent's misbehavior originate from its central offices, but those same offices have made a calculated effort to put that misconduct to its best advantage. In the present case, the evidence shows that in speeches in three states, Respondent attempted, no doubt with some success, to chill the ardor of employees for the Union by gloating about the Union's utter lack of progress at the organized plants, a lack of progress found here to be attributable to a resolve to defy the statute. It can scarcely be doubted that the eyes of all Stevens employees are turned to Roanoke Rapids, the only location at which the Union has secured representation

rights through an election victory,[67] for some signal that Stevens is willing to respect the spirit of the law at long last. When Respondent instead gears up its resistance, and actually flaunts its intransigence at the bargaining table as a new weapon in "its now all too familiar pursuance of full-scale war against unionization," *Stevens VII, supra,* 441 F. 2d at 521 (C.A. 5), remedies reaching the length and breadth of its enterprise are imperative.

The appropriateness of widespread application of remedies in Stevens cases is settled. Even at the beginning, in *Stevens I, supra,* the Court agreed that mailing and posting of notices should be required at all forty-three plants in North and South Carolina, although violations had occurred at only twenty of them. The Court pointed out that the plants were contiguous; that since the policies which gave rise to the unfair labor practices were centrally developed, there was "every reason to believe that if not deterred, [the Company] would pursue the same discriminatory policies throughout the region;" and that "the Company's practices were 'so extensive and so well-publicized that they must inevitably have had a coercive impact' at the remaining plants." 380 F. 2d at 304. After ten more years of determined unlawfulness, publicity, and Congressional hearings, enterprisewide remedies have become, for Stevens, commonplace.

In *Stevens XVI,* 220 NLRB 270, on the basis of a single Section 8(a)(1) violation, the Board, taking cognizance of Respondent's history, ordered that copies of the notice be posted at all of Respondent's plants. Accord, *Heck's, Inc., supra.* Only recently, in *Florida Steel Corporation,* 233 NLRB No. 74, the Board issued a number of broad, companywide remedies. The remedies recommended be-

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67. And the only plants at which the Union holds viable representation rights. The Statesboro plant has closed.

low, then, shall apply to all plants and facilities and all employees of Respondent, wherever located in the United States, except as otherwise indicated.

Posting of notices. The Respondent shall be required to post the appended notice, marked as "Appendix A", at all plants and facilities, the notice to be signed by its president and the chairman of its board of directors, by each of the other members of its board of directors, and by the highest managerial official of the plant in which the notice is posted. *Stevens XVIII Contempt Adjudication,* ..... F. 2d ....., 96 LRRM 2748 (October 19, 1977) (C.A. 2).

Mailing and Reading of notices. The Respondent shall be required to mail to the home of each of its employees a copy of the notice marked "Appendix A," together with a letter, appended hereto as "Appendix B," to be reproduced on the Company's regular business stationery and signed by the highest official of the recipient's plant. *Ibid.* At a reasonable time after the entry of this order, the Respondent shall convene during working time by departments and shifts all its employees at all plants and facilities and, at its option, either have the notice marked as "Appendix A" read by the highest managerial official in the plant or provide facilities and permit a Board agent to read the notice to the employees. In the event the Respondent chooses the former option, the Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent. *Ibid.*

Union Access. The Charging Party seeks, in addition to the foregoing remedies, access to bulletin boards, provision of lists of employees, speaking opportunities, and access to non-work areas at all of Respondent's plants. While the line is not easily drawn, there is some difference between the remedies provided above, which seek to assure employees that, once a union is chosen, Respondent will

abide by its bargaining obligations, and these requested remedies, which appear, at least superficially, to be addressed to the Union's organizational problems in communicating with employees. These remedies, however, do not simply compensate for such inhibitions on access; they also can be effective vehicles for making a substantive presentation of the fact that unions can be useful and effective, a fact which Respondent has improperly sought to throw into doubt by engaging in unlawful conduct at Roanoke Rapids for broadcast at other locations.

Those locations included plants in Virginia, Alabama, and Georgia. While the record does not otherwise reflect the extent to which the Roanoke Rapids bargaining has been employed as a weapon in Respondent's "full-scale war against unionization," it seems safe to say that there has been widespread publicity, either voluntary or self-induced. The Supreme Court said in *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 704, "One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act." One such "unwholesome effect" here is Respondent's promiscuous retailing at other facilities of its illicit conduct at Roanoke Rapids. It therefore would be appropriate to afford the Union the requested access to all plants and employees, in the hope that the Union will in some measure be able to counteract the predictably adverse emanations which have flowed from what is now more than three years of fruitless bargaining at Roanoke Rapids. The Court noted in *Stevens VII*, 441 F. 2d at 528, that "[t]here has been over the years a careful tailoring of remedies to meet the peculiar problems posed at the Stevens' plants." It would appear that a few more stitches are required.

The Second Circuit Contempt Adjudication, *supra*, in fact already provides for Union access to bulletin boards,

Union presence at and ability to respond to captive audience speeches, an absolute Union right to make pre-election speeches, furnishing to the Union of employee names and addresses, and Union access to non-work areas during non-work periods, at all of Respondent's plants in North and South Carolina, which, judging from *Stevens I, supra,* constitute more than one-half of Respondent's plants. It is fitting, however, for the reasons given above, that the same opportunities be extended to the Union at the remaining plants. It is therefore recommended that the provisions contained in paragraphs 11, 12, 13, 14, and 15 of the Contempt Adjudication be applied, as part of the remedy herein, to all plants and facilities of Respondent other than those already affected by the Second Circuit Adjudication.

Contending that the record discloses "massive evidence of unilateral changes in terms and conditions of employment," the Charging Party urges that "a dispute settling mechanism be required for all matters which are the subject of collective bargaining and that Respondent be required to adjust terms and conditions of employment through this mechanism." The structure of this "interim arbitration device" is nowhere clearly defined by the Union, except by such references as "a form of official overview of the bargaining process" which would be "limited to the pre-contract period." I take the proposal to be the establishment of a system under which a Board-appointed arbitrator would finally determine all disputes involving negotiable changes affecting mandatory subjects of bargaining.

Although Charging Party argues that *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, is distinguishable because the arbitrator would not be writing contract terms as such, I think that is too restricted a view of an opinion which forbids, even in the presence of a finding of bad

faith, "allowing the Board to compel agreement when the parties themselves are unable to agree [,which] would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." 397 U.S. at 108. For the Board to appoint, or require the appointment of, an arbitrator empowered to decide with finality disputes over whether a cafeteria should be closed or an employee discharged would do violence to this language.

The Charging Party presses for reimbursement of the Union's litigation costs. In *Heck's, Inc., supra,* 191 NLRB at 889, the Board rejected such relief, relying on the "role of a charging party under the statutory sc[illegible]me in the light of the basic principles that Board orders must be remedial not punitive, and collateral losses are not considered in framing a reimbursement order," and holding that the public interest in allowing the union to recover the cost of participation in the litigation did "not override the general and well-established principle that litigation expenses are ordinarily not recoverable." In its Second Supplemental Decision in *Heck's, Inc.,* 215 NLRB 765, the Board further explained its interim holding in *Tiidee Products, Inc.,* 194 NLRB 1234, 1236, that litigation expenses were properly awardable to both the Board and the charging party where "frivolous litigation" was involved. In *Heck's III,* the Board explicated its intended delineation in *Tiidee* that where "debatable," as contrasted to "frivolous," defenses were litigated, the fact that the unfair labor practices found could be characterized as "flagrant" or "pervasive" was an insufficient basis for awarding costs.

In *Heck's III,* the Board declared that it did not intend to foreclose further review of the issue: "We do not imply that the need for additional or expanded remedies may not be established by the degree of repetition of

misconduct;" "Nor do we intend to exclude from consideration whether . . . we ought to apply some more definitive criterion than the distinction between 'debatable' and 'frivolous' which thus far we have been utilizing;" "At the same time, we wish to make clear in this opinion that . . . [we do not] intend to lock in concrete any past precedent, nor to appear to make this Decision the authoritative expression of future remedial policy." 215 NLRB at 768.

There are two persuasive arguments in the present case for the award of litigation costs. First, the defenses raised by Respondent do not, in my view, constitute "debatable" issues within the contemplation of *Tiidee*. Unlike *Heck's*, there are no significant factual controversies here; Respondent fully understood what it was about at all stages of the bargaining relationship, and was aware of the nature of the evidence available to be used against it in the litigation. For Respondent to claim, having clearly determined not to bargain in good faith, that the evidence gives rise to a "debatable" question on that score, is to subvert any possible rationality which may attach to the distinction.

Secondly, the Board's adherence in *Heck's II* to the "general and well-established principle that litigation expenses are ordinarily not recoverable" indicates that the Board is inclined to apply to Board remedies in this area the distillate of judicial experience. But that experience has carved out exceptions to the general rule, to which, it would appear, the Board has not consciously addressed itself.

It is now settled that courts may award litigation costs against disputants who have engaged in deliberate misconduct. The Supreme Court summed it up in *Hall v. Cole*, 412 U.S. 1, 5: "Thus, it is unquestioned that

a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Accord, *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258. Among the cases supporting this principle cited by the Court in *Hall,* two seem particularly relevant here: *Bell v. School Board of Powhatan County,* 321 F. 2d 494, 500 (C.A. 4), where fees were awarded because of "the long continued pattern of evasion and obstruction" by the defendants, and *Rolax v. Atlantic Coast Line R. Co.,* 186 F. 2d 473, 481 (C.A. 4), where the Court said, "The justification [for an award of counsel fees] here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization . . . ."

Unlike most civil litigation, the cases brought before the Board more often than not involve what may be characterized as "bad faith" or "oppressive" conduct, and the Board might consider it inappropriate to establish that single benchmark as the determinant of an award of litigation costs. The leading case of *Vaughan v. Atkinson,* 369 U.S. 527, provides an additional standard which would limit the applicability of such a remedy in a sensible but meaningful way. The Court there approved an award of fees where "[the] default was willful and persistent," *id.* at 531. Similarly, in *Brewer v. School Board of the City of Norfolk,* 456 F. 2d 943, 949 (C.A. 4), the Court noted the "normal exception to the general rule" to be "where the behavior of a litigant has reflected a willful and persistent 'defiance of the law.'" Such "willful and persistent defiance" portends precisely the same result as the "frivolous litigation" decried by the Board in *Tiidee,* 194 NLRB at 1236; it "is clearly unwarranted and should be kept from the nation's already crowded court dockets as well as [the Board's] own."

Since there can be no doubt that Respondent has, with "bad faith," displayed the requisite "willful and persistent defiance of the law;" since that conduct falls within established exceptions to the counsel fee rule in American jurisprudence; and since, as discussed, the Board indicated in *Heck's* that it would consider the adoption of new standards in this area based on "the degree of repetition of misconduct," I shall recommend that Respondent be required to reimburse the Board and the Union for their expenses incurred in the "investigation, preparation, presentation, and conduct of their cases, including the following costs and expenses incurred in . . . the Board . . . proceedings: reasonable counsel fees, salaries, witness fees, transcript . . . costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses." *Tiidee, supra,* 194 NLRB at 1236-1237.[68]

General Counsel and Charging Party also request that Respondent be ordered "to reimburse the Union for expenses incurred in attempting to negotiate a collective bargaining agreement." There is helpful precedent for this contention in *M.F.A. Milling Company,* 170 NLRB 1079, 1080, where the Board ordered reimbursement of the wages lost by employee members of the union negotiating committee, reasoning that the employees "did not receive the compensatory benefit of good-faith bargaining for which they sacrificed their wages." By logical extension, any dues payments made by Roanoke Rapids Union

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68. While counsel for the General Counsel managed this lengthy and complex litigation, and did so very well indeed, the evident contributions of counsel for the Charging Party cannot be overestimated. At the start of the hearing, Respondent was represented by five attorneys, and soon thereafter the number stabilized at two trial counsel and a member of Respondent's house counsel staff. Counsel for General Counsel was the only Government attorney assigned to this case, and he was assisted throughout by counsel for the Union. The lengthy brief submitted by the Union has been quite helpful.

members were sacrificed when their negotiators, at no little expense, sat at the bargaining table for many months without the slightest chance of seeing a return on the money of the employees.[69] In any event, the monies wasted by the Union in bargaining were a direct and proximate product of Respondent's willful defiance of its statutory obligation. These losses flowed from the default, and compensation therefor would simply restore the *status quo ante*.

I shall therefore recommend that Respondent be required to reimburse the Union for reasonable salaries, travel costs, per diem,[70] and other reasonable collective bargaining expenses incurred, commencing with the first formal bargaining session on October 31, 1974, and terminating as of July 1, 1976, when the first complaint in this matter was issued.

In cases such as this one, it is customary for the Board to extend the certification year so that it begins on "the date the Respondent commences to bargain in good faith." *Thompson Machine & Tool Corporation,* 172 NLRB 1671, n. 1, 1674. Charging Party requests that the extension be expanded to encompass a two-year period.

I do not find the contention persuasive. In other cases where employers have bargained in bad faith, the Board has allowed no more than the additional one year. One more year of bargaining here should tell the tale. There have already been in excess of two years of negotiations, and all the proposals have long since been submitted. At the end of the next year of bargaining, Respondent will

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69. Although Hoyman testified that members of the Roanoke Rapids local were not required to pay dues until a contract was secured, it may well be that enthusiastic supporters made such payments despite the dispensation.

70. These three items of reimbursement should be limited to Hoyman, Du Chessi, and any other regular negotiator.

either again be charged with improper bargaining or will not. If the former, and the complaint is found to be justified, the year will not have begun to run. If Respondent has satisfied its statutory duties as of the end of the year and thereafter has adequate reason for withdrawing recognition, it seems pointless to require Respondent to keep bargaining in good faith for still another year, having presumably reached impasse much earlier.

I shall further recommend that Respondent be required to compensate Patterson plant employees, at the prevailing wage levels, for all double shifts worked after September 1974 as to which they were not accorded the customary hour of free time; even though this will result in double compensation for employees who, after the unilateral modification of the rule, no longer continued to take an hour off, it appears to be a reasonable remedy for the loss of free time thereby suffered. In addition, I recommend that fabricating department employees whose holiday pay was diminished as a result of the change in the method of computation at Christmas 1974 and New Year's and July 4, 1975, be reimbursed for such losses. In both matters referred to in this paragraph, interest shall be paid as prescribed in *Florida Steel Corporation*, 231 NLRB No. 117. As a practical matter, I see no purpose to be served by requiring Respondent to undo the other unilateral actions found here.

Finally, I recommend entry of the customary cease and desist order. Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[71]

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71. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

J.P. Stevens & Co., Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Bargaining in bad faith for a collective-bargaining agreement, and about other mandatory subjects of bargaining, with Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC ("the Union"), as the exclusive representative of its employees in the following appropriate bargaining unit[72] (and in all other bargaining units as to which a labor organization's right to represent employees has been established in appropriate legal proceedings):

> All production and maintenance employees, including plant clerical employees, laboratory technicians, janitors, local truck drivers, training center instructors, customer service man and the mail carrier at Respondent's Roanoke No. 1, Roanoke No. 2, Patterson, Rosemary, Delta No. 4, Fabricating, and Roanoke Yarn and Dye plants at Roanoke Rapids, North Carolina, but excluding office clerical employees, professional employees, fire-watchers, yarn planning man, designer and assistant designer, the design department, and guards and supervisors as defined in the Act.

(b) Unilaterally taking action with respect to wages, hours, and other terms and conditions of employment without affording the Union, or any other labor organization entitled as indicated above, reasonable opportunity to bargain thereon.

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72. For the purpose of determining the effective period of the certification, the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.

(c) Refusing to timely furnish information to the Union, or to any other labor organization entitled as indicated above, which is relevant and useful to the performance of the statutory duties of a labor organization.

(d) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights set out in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment, and upon request embody in a signed agreement any final understanding reached.

(b) Consult with the Union and afford it an opportunity to bargain collectively with respect to any changes in wages, hours, and other terms and conditions of employment before implementing such changes.

(c) Make whole all employees adversely affected by Respondent's unilateral changes in the practice of awarding free time for double-shift work, and in the computation of holiday pay, as set forth in the section of this decision entitled "The Remedy."

(d) Post in conspicuous places in each of Respondent's plants, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, copies of the notice appended hereto as "Appendix A." Copies of the notice,[73] on forms provided

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73. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by the Regional Director for Region 11, shall be signed on behalf of Respondent by its president and the chairman of its board of directors, and, in addition, by each of the other members of the board of directors and by the highest managerial official of the plant in which the notice is posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Reproduce and mail to the home of each of its employees at all of its plants, a facsimile of the aforesaid signed notice, together with a letter appended hereto as "Appendix B." Said letter shall be reproduced on the Company's regular business stationery and signed by the highest official of the recipient's plant. Respondent shall provide the Regional Director for Region 11 with proof of such mailing.

(f) At such reasonable time after the entry of this Order, as the Board may request, convene during working time by departments and shifts all its employees in each of its plants, and, at its option, either have the notice read by the highest managerial official in the plant or provide facilities and permit a Board agent to read the notice to the said employees. In the event Respondent chooses to have the notice read by its official, the Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent.[74]

(g) Upon request of the Union, made within 2 years from the date hereof, immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are cus-

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74. Subparagraphs (g), (h), (i), (j), and (k) hereinafter apply only to plants and facilities of Respondent not comprehended by the Contempt Adjudication issued by the United States Court of Appeals for the Second Circuit in *N.L.R.B. v. J.P. Stevens & Co., Inc.*, 96 LRRM 2748, October 19, 1977.

tomarily posted, at each of Respondent's plants, for a period of 1 year from the date of request.

(h) In the event that during a period of 2 years following entry of this Order, any supervisor or agent of Respondent convenes any group of employees at any of Respondent's plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two Union representatives a reasonable opportunity to be present at such speech, and, upon request of said representatives, permit one of them to address the employees for the same amount of time as Respondent's address.

(i) If within the next 2 years, the Board schedules an election in which the Union participates at any of Respondent's plants, then, upon request by the Union, afford at least two Union representatives reasonable access to each of Respondent's said plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

(j) Upon request of the Union, immediately furnish it with lists of the names, addresses and classifications of all of Respondent's employees at each of its plants as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during the 2 year period referred to above.

(k) For the 2 year period, upon request of the Union, without delay, permit a reasonable number of Union representatives access for reasonable periods of time to all its canteens, rest and other non-work areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes or

other non-work periods. Respondent shall formulate rules on this subject in the same manner as provided in paragraph 10 of the Contempt Adjudication referred to above.

(l) Pay to the Board and the Union the reasonable costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding before the Board, and pay to the Union the reasonable costs of participating in the collective-bargaining negotiations, as set forth in the section of this Decision entitled "The Remedy."

(m) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, and all other records necessary or appropriate to analyze the amounts due employees.

(n) Notify the Regional Director for Region 11, in writing, within 20 days of the receipt of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the consolidated complaint found to be without merit are hereby dismissed.

Dated, Washington, D.C. December 21, 1977

/s/ Bernard Ries
Bernard Ries
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL SIDES HAD A CHANCE TO GIVE EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS AGAIN FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT.

We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization;

To form, join, or help unions;

To bargain collectively through representatives of their own choosing;

To act together for purposes of collective bargaining or other mutual aid or protection;

To refrain from any or all these things.

The Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, is the recognized collective-bargaining representative of our hourly employees at Roanoke Rapids, North Carolina.

WE WILL NOT refuse to bargain in good faith for a collective-bargaining agreement with the aforesaid Union regarding wages, hours, and working conditions

of the employees in the bargaining unit; WE WILL NOT take action affecting wages, hours, and working conditions of such employees without negotiating with the Union; and WE WILL NOT refuse to furnish information to the Union to which it is entitled under the law. The foregoing applies as well to any labor organization which is now, or hereafter becomes entitled, to represent any of our employees.

WE WILL compensate all Roanoke Rapids employees who were affected by our 1974 change in the policy relating to free time for employees working double shifts, and WE WILL compensate all Roanoke Rapids employees who lost money because of our change in the method of computing holiday pay in 1974 and 1975.

WE WILL compensate the Union and the Board for their expenses in preparing for and conducting this case, and WE WILL compensate the Union for its expenses in participating in collective-bargaining negotiations with us between October 1974 and July 1976.

WE WILL send to all our employees copies of this notice, with an explanatory letter; WE WILL read this notice to all our employees; and WE WILL grant the Union, as ordered, access to our bulletin boards, access to our nonwork areas, speaking opportunities, and lists of the names and addresses of our employees at many of our plants.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

J. P. Stevens & Co., Inc.
(Employer)

Dated: ..... By: .....
(President)

..... By: .....
(Chairman of the Board of Directors)

..... By: .....
(Member of the Board of Directors)

..... By: .....
(Member)

..... By: .....
(Member)

..... By: .....
(Plant Manager)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U. S. Courthouse, Federal Building, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101 (Tel. No. 919—761-3212).

APPENDIX B

Dear Stevens Employee:

This letter, and the enclosed notice, is being sent to all J.P. Stevens employees, to inform you of a recent decision by the National Labor Relations Board* relating to the Stevens plants in Roanoke Rapids, North Carolina.

The Amalgamated Clothing & Textile Workers Union of America, AFL-CIO-CLC was selected by the Roanoke Rapids hourly employees in September 1974 to represent them for purposes of collective bargaining. After a trial, the Labor Board found that the Company failed to bargain in good faith during the negotiations which followed the election, and, as well, failed to consult with the Union about certain changes in working conditions and failed to furnish the Union all the information to which it was entitled under the law.

As you can see from the enclosed notice, the Company has promised that it will compensate the Union, the employees, and the Government for their losses arising out of the violations found. We have further promised that, in the future, we will comply in good faith with the labor laws. Therefore, anything you have heard which would indicate that the Company does not intend to bargain sincerely with a labor organization, at any of its plants, is completely erroneous.

The Supreme Court of the United States has said that, in collective bargaining, employers must bargain "with the serious intent to adjust differences and to reach an acceptable common ground." In any future negotiations by our Company with any union, we intend to fully abide by that principle.

Sincerely yours,

(Plant Manager)

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*Should the Board's order be enforced, add here: ", approved by a United States Court of Appeals,".

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1247

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

No. 79-1254

Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

Argued February 4, 1980 Decided June 11, 1980

Before BUTZNER and SPROUSE, Circuit Judges, and JOSEPH C. HOWARD, United States District Judge for the District of Maryland, sitting by designation.

BUTZNER, Circuit Judge:

J. P. Stevens & Co. and the Amalgamated Clothing and Textile Workers Union petition for review of an order of the National Labor Relations Board holding that J. P. Stevens & Co. violated §§ 8(a)(1) and (5) of the National Labor Relations Act [29 U.S.C. §§ 158(a)(1) and (5)].[1]

Stevens seeks to set aside the order, and the union requests expansion of the remedy. The Board cross-petitions for enforcement. We enforce all of the provisions of the order except one. The exception concerns reimbursement for litigation and negotiating expenses; we remand this question to the Board for further consideration.

I

The union's predecessor[2] was certified in September, 1974, as collective bargaining representative for 3,000 production and maintenance employees at the company's seven plants in Roanoke Rapids, North Carolina. The parties promptly commenced negotiations and met frequently during the next two years without reaching a bargaining agreement. During the negotiations, the union charged the company with committing a number of unfair labor practices. The complaints that subsequently issued, save one that was settled, were consolidated. After extensive hearings, the administrative law judge particularized in minute detail the basis for his factual findings, all of which the Board adopted.

The Board held that Stevens violated §§ 8(a)(1) and (5) by making unilateral changes in compensatory

1. J. P. Stevens & Co., 239 NLRB No. 95 (1978).

2. Textile Workers of America, the elected bargaining representative, merged with the Amalgamated Clothing Workers of America in 1976. *See generally* America Enka Co., 231 NLRB 1335 (1977).

time for double shifts, holiday pay, and choice of personal respirators. Other violations were delays in furnishing relevant information about efficiency ratings and standards of weavers, new job descriptions for inspectors, and specific data about the selection of respirators. The Board's findings of fact are supported by substantial evidence, and its conclusions are warranted by law. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 222 (1964) (Stewart, J., concurring); NLRB v. Katz, 369 U.S. 736, 743 (1962); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

As amended the complaint charged, and the Board found, that during negotiations the company instituted corporatewide changes respecting profit sharing, wage rates in 1975 and 1976, and a group insurance program. Despite requests for information concerning these mandatory subjects of bargaining, the company withheld relevant information and announced or implemented the changes at a time and in a manner that precluded realistic bargaining at Roanoke Rapids. Referring to the company's conduct, the Board said:

> [I]n four separate instances [Stevens] engaged in a bargaining strategy violative of Section 8(a)(5) of the Act. This tactic consisted of developing comprehensive improvements in corporatewide benefit programs, keeping the Union in the dark regarding information necessary and relevant for purposes of collective bargaining, and timing the announcement or implementation of these changes to preclude any meaningful negotiation concerning their possible implementation at the Roanoke Rapids facility.

There can be no doubt that this conduct violated § 8(a)(5). NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Katz, 369 U.S. 736 (1962). Besides, the Board detected

in this bargaining strategy more than isolated unfair labor practices. Finding that the union's choice of either accepting or rejecting these unilateral changes was in fact illusory, the Board observed: "The record . . . clearly demonstrates that this tactic was a most effective means of undermining the collective-bargaining process and denigrating the union's status as collective-bargaining agent." The Board therefore held that "these violations go to the very heart of the Act and our national policy." We find no error in the Board's assessment. Indeed, the company's essentially similar tactic in bargaining at its Statesboro plant was deemed contemptuous in NLRB v. J. P. Stevens & Co., 538 F.2d 1152, 1163-64 (5th Cir. 1976).

In NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154-55 (1956), Mr. Justice Frankfurter, concurring in part and dissenting, explained the Act's requirement of good faith bargaining:

> [The Act] obligate[s] the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. "Good faith" means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled tes-

> timony about all this makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation.

The Board adhered to these precepts. To ascertain the state of mind of the company's responsible officials, it considered all of the circumstances attending the years of fruitless bargaining. The Board took cognizance of conduct, thoroughly documented in the record, that included the company's dilatory tactics, its adamant adherence to demonstrably unreasonable positions, its dissemblance with respect to its plans for changes in conditions of employment, its denigration of the union, the lack of authority of its negotiators who were uninformed about company policy, and the history of the company's hostility to the union. From the totality of this evidence, the Board rationally could draw the inference that the company had not bargained in good faith as required by the Act. *See, e.g.*, International Ladies' Garment Workers Union v. NLRB, 463 F.2d 907, 917 (D.C. Cir. 1972); Kellwood Co. v. NLRB, 434 F.2d 1069, 1072-74 (8th Cir. 1970); NLRB v. May Aluminum, Inc., 398 F.2d 47, 51 (5th Cir. 1968); NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 264-65, 265-66 (2d Cir. 1963); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953); Great Southern Trucking Co. v. NLRB, 127 F.2d 180, 185 (4th Cir. 1942).

II

The remaining issues concern the remedies that the Board ordered. The company insists that some of them must be rejected, and the union complains that they are inadequate. Briefly summarized, the Board's order requires the company: to cease and desist from the unfair labor practices committed at its Roanoke Rapids plants and at other facilities where a union establishes its legal

right to represent employees; to post at all plants and mail to employees an appropriate notice and letter; to afford the union access through bulletin boards and representatives in non-working areas on non-working time, and to allow equal time to respond to company speeches on the subject of union representation; upon request to bargain collectively in good faith with the union as exclusive representative of the Roanoke Rapids employees. The bargaining order was amplified by a provision requiring the company:

> to notify the Union promptly of any decision to announce or institute systemwide changes in employee benefits; to produce upon request all information relevant thereto for purposes of collective bargaining, prior to the announcement or implementation of such changes in benefits on a companywide basis; and to afford the Union an opportunity to negotiate regarding similar or identical contemplated changes at the Roanoke Rapids plant.

The Board also ordered the company to make whole the employees for losses suffered by the unilateral changes in holiday and double shift policies and to pay the union's reasonable negotiating expenses and the Board's and the union's reasonable litigation costs.

Section 10(c) of the Act [29 U.S.C. § 160(c)] states that the Board, upon finding that an unfair labor practice has been committed, "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act] . . . ." The Board's choice of remedy is particularly a matter within its own discretion, open only to limited review. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215-16

(1964). That choice should stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric and Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

These principles warrant enforcement of the Board's cease-and-desist order. In view of the fact that the company's bargaining tactics resembled in part those found unlawful at the Statesboro plant in NLRB v. J. P. Stevens & Co., 538 F.2d 1152 (5th Cir. 1976), application of the cease-and-desist order to other plants where a union legally attains representative status is a remedial measure calculated to prohibit repetition of the company's unfair labor practices. We have recognized that the Board can order an employer to cease unfair labor practices at its other plants on proof of a violation at one location when companywide policy is involved. Heck's, Inc., 159 NLRB 1151, 1157-58 (1966), *enforced,* 387 F.2d 65 (4th Cir. 1967) (2d case); *see also* NLRB v. Heck's Inc., 388 F.2d 668, 669 (4th Cir. 1967).

The provisions of the order concerning companywide dissemination of the notice and access to company plants is similar to the order in J. P. Stevens & Co., Inc., 240 NLRB No. 35 (1979), *enforced,* 612 F.2d 881 (4th Cir. 1980); *see also* NLRB v. J. P. Stevens & Co., Inc., 563 F.2d 8 (2d Cir. 1977). The company argues, however, that the imposition of remedies dealing with the union's organizational efforts has nothing to do with a refusal to bargain in an organized plant. It relies on the unquestioned proposition that the Board cannot impose punitive orders. *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

This provision of the Board's order is predicated on its finding that the company employed its unlawful bargaining strategy to chill the union's organization of other

plants. The notice and access order is designed to counteract the use the company has made at other plants of its unfair labor practices in bargaining at Roanoke Rapids. Therefore the order is not punitive. It is designed to "effectuate the policies of the Act." *Virginia Electric & Power Co.*, 319 U.S. at 540; Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).

We also find no occasion to set aside that portion of the order requiring the company to give notice of proposed systemwide changes, furnish information, and bargain with the union regarding the contemplated changes for the unit at Roanoke Rapids. Contrary to the company's assertion, this provision does not require it to bargain over benefits for unrepresented employees. The order is specifically limited to the Roanoke Rapids plant. If, as a result of bargaining, a company proposal is modified, nothing in the order requires the modified version to be implemented at plants where the union is not the bargaining representative. The company retains the option to adopt or reject the results of bargaining at its other plants. *Cf.* Hollywood Brands, Inc., 142 NLRB 304 (1963), *enforced*, 324 F.2d 956 (5th Cir. 1964).

III

The administrative law judge found two "persuasive arguments" for awarding litigation and negotiating expenses. First, he concluded that the case had presented "no significant factual controversies." Second, he held that the company in "bad faith" had displayed "willful and persistent defiance of the law." Additionally, he justified the award of negotiating expenses by reasoning that there was a nexus between the company's unfair labor practices and the union's fruitless expenses. The Board adopted, without amplification, the administrative law

judge's analysis and findings concerning these monetary remedies.

The company challenges the award of these expenses on the grounds, first, that 29 U.S.C. § 186 bars such awards, and, second, that the award is contrary to the Board's precedents.

At the outset we dismiss the statutory argument. Section 186 was intended to prevent corruption by labor and management, and it does not apply to Board decisions which are enforced through court order. *See* 29 U.S.C. § 186(c)(2).

Although the Act presents no obstacle to requiring reimbursement, we find merit in the company's second claim. Because we discern ambiguity in the administrative law judge's analysis and in the Board's silent adoption of his reasoning, we decline to enforce this part of the Board's order, and we remand these issues to the Board for further consideration.

In Heck's Inc., 215 NLRB 765, 767 (1974), the Board stated its policy on the award of litigation and other expenses:

> Thus, [prior] cases, when read together, indicated our intent to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in "clearly aggravated and pervasive misconduct" or in the "flagrant repetition of conduct previously found unlawful," where the defenses raised by that respondent are "debatable" rather than "frivolous." Likewise, it was our intention, under similar circumstances, to refrain from ordering reimbursement of excess organizational costs although a nexus has been shown between such excess costs incurred by a union and the unfair labor practices committed by an employer.

The Board established in *Heck's* that a defense is "debatable" where the credibility of witnesses is involved and that reimbursement of these expenses cannot then be required. 215 NLRB at 768. It also observed that, while it would continue to apply this distinction between "debatable" and "frivolous" defenses, in a suitable case it would reconsider, clarify, or add to these governing principles, especially where necessary because of "the degree of repetition of misconduct." 215 NLRB at 768 & n.23. During the intervening years, however, the Board has adhered to its policy that these remedies are appropriate only when the defenses asserted by the charged party are "frivolous." *See, e.g.*, Kings Terrace Nursing Home, 227 NLRB 251 (1976).

It was largely the lack of any factual differences—that is, the absence of questions of credibility—that induced the administrative law judge in this case to hold that the defenses were not debatable and that under Board precedent the company should reimburse the union and the Board for their expenses. The administrative law judge, however, did not explicitly rule that the company's defenses were frivolous. Perhaps in finding them not debatable he implicitly intended to find that they were frivolous. If so, we cannot accept this conclusion. In no case called to our attention has the Board held unequivocally that a not-debatable defense is a frivolous defense. The terms are not necessarily coextensive. In this case, for example, the administrative law judge ruled in favor of the company on several issues. Moreover, he sustained the company's objections to several remedies that the union proposed. Neither the administrative law judge nor the Board adverted to these indicia of the absence of frivolity.

We also detect ambiguity in the second argument advanced by the administrative law judge, and adopted

by the Board, for imposition of this remedy. Heretofore, the Board has refused to require reimbursement even though "the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful.' " *Heck's*, 215 NLRB at 767. The Board has noted, however, that it "did not imply that the need for additional or expanded remedies may not be established by the degree of repetition of misconduct." 215 NLRB at 768 n.23. Relying on this footnote, the administrative law judge justified the award on the basis of the company's "bad faith" and "willful and persistent defiance of the law." He found precedent in an exception to the general rule disallowing fees in civil actions, applicable when an adversary engages in such conduct. Although the phrasing of the Board's rule in *Heck's* for denying reinmbursement differs from that of the administrative law judge's in awarding reimbursement, we believe that there is no substantive difference in these standards.

The Board's decision leaves us uncertain about the basis of its award. The parties assumed that the Board's order rested on both of the arguments that the administrative law judge found persuasive. We cannot be sure. Two months after deciding the case under review, the Board decided J. P. Stevens & Co., Inc., 240 NLRB No. 35 (1979), *enforced*, 612 F.2d 881 (4th Cir. 1980). There, where credibility was an issue, the Board summarily denied the union's request for reimbursement of litigation expenses although the union, as here, buttressed its request by allegations referring to the company's "long history of violation . . . and its flagrant disregard of Board decisions and court orders." This decision raises a question about the likelihood that in the case under review the Board intended to adopt a new standard based solely on "the degree of repetition of misconduct."

Alternatively, the Board may have intended to change its standard of "frivolity" to a lesser one, applicable to cases in which some issues are decided in favor of the charged party. It may have contemplated requiring reimbursement when this lesser standard of not-debatable defenses combines with a certain degree of repetition of violations.

In short, it is difficult to ascertain from the administrative law judge's decision why the Board apparently departed from its precedents. Therefore, the Board should explicate more fully its reasons for requiring reimbursement in this case. The Board may change its policies. Indeed, it has a duty to alter them to respond to new circumstances. When it deviates from its precedents, however, it must make a reasoned explanation for the change. Remand for this purpose is appropriate. Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977); K. Davis, Administrative Law of the Seventies § 17.07-4 (1976).

IV

Much of what we have said in Part II concerning the Board's broad discretion to fashion remedies is pertinent to the union's contention that the Board erred in not granting more extensive relief. The union proposed the creation of an interim dispute-settling mechanism to prevent further improper unilateral actions by the company. This was properly rejected because the Board concluded that it would trench on the principles of H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970), which denies to the Board the power to compel agreement to substantive contractual provisions. The refusal to impose a corporatewide bargaining order covering plants where the union has a card majority and the company has committed unfair labor practices precluding a fair election rests on precedent established in Heck's, Inc., 191 NLRB 886, 888 (1971), *enforced*

in rel. part sub nom. Food Store Employees Union v. NLRB, 476 F.2d 546, 549-50 n.4 (D.C. Cir. 1973), *rev'd on other grounds,* 417 U.S. 1 (1974). Finally, in light of the Board's bargaining order, we find no abuse of discretion in its refusal to extend certification for two years. As the Board observed, if the company complies with the order one more year of bargaining should suffice; if the company does not comply, it will again be charged, and "the year will not have begun to run."

V

In summary, the Board's order is enforced, save for paragraph (m) (as designated by the Board's modification of the proposed order) dealing with reimbursement for litigation and negotiating expenses. This issue is remanded to the Board for further consideration.

29 U.S.C. § 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment,

settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employees groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides

that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of

value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to

the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.